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In the Supreme Court of the United States

OCTOBER TERM, 1995

DANIEL R. GLICKMAN, SECRETARY OF AGRICULTURE,  
PETITIONER

v.

WILEMAN BROS. & ELLIOTT, INC., ET AL.

ON WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE NINTH CIRCUIT

JOINT APPENDIX  
Volume III

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[1491]

UNITED STATES DEPARTMENT  
OF AGRICULTURE  
BEFORE THE SECRETARY OF  
AGRICULTURE

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AMA DOCKET No. F&V 916-3  
AMA DOCKET No. F&V 917-4

IN THE MATTER OF WILEMAN BROTHERS & ELLIOTT,  
INC., A CALIFORNIA CORPORATION AND KASH, INC.,  
A CALIFORNIA CORPORATION, PETITIONERS

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Federal Building  
1130 "O" Street  
Room 2002  
Fresno, California,

Wednesday, January 31, 1990

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[Excerpts from testimony of Ray Gerawan]

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The above-entitled matter came on for hearing,  
pursuant to Notice, before the Secretary of Agriculture,  
at 9:00 a.m.

Before: DOROTHEA A. BAKER, Administrative  
Law Judge

APPEARANCES:

For The Government

GREGORY COOPER, Esq.  
Ms. HELEN BOUTROUS Esq.  
U.S. Department of Agriculture  
Office of General Counsel  
Marketing Division  
14th & Independence Avenue  
Washington, D.C. 20250

\* \* \* \* \*

[1689]

MR. COOPER: Thank you, Mr. Petersen, no further questions.

JUDGE BAKER: Very well, are there any additional questions of this witness?

MR. CAMPAGNE: No, your Honor. Thank you, Mr. Petersen.

JUDGE BAKER: Thank you, very much, Mr. Petersen.

Now, I understand some arrangements have been made with respect to the presentation of the next witness.

MR. CAMPAGNE: Yes, your Honor. Our next witness will be Mr. Ray Gerawan.

JUDGE BAKER: Very well. Would you step forward and be sworn in on the stand.

Whereupon,

RAYMOND MICHAEL GERAWAN,

was called as a witness and, having been first duly sworn, was examined and testified as follows:

# DIRECT EXAMINATION

BY MR. CAMPAGNE:

Q Mr. Gerawan, I know that a lot of us in this room know you, but your Honor has never met you before so I need to ask you some background data and please bear with me. Can you please state your full legal name for therecord?

[1690]

A Raymond Michael Gerawan.

Q And are you the owner of a company which grows, ships and sells tree fruits?

A Yes, I am.

Q And what is the name of that company?

A Gerawan Company.

Q And is this a family owned company?

A Yes, it is.

Q Consisting of you and your children?

A Yes.

Q And—

A Consisting of my wife and I and family, yes.

Q I see. And—let's put it this way, it's not a public corporation or—

A No, it is not.

Q —not traded on the American Stock Exchange or anything like that?

A No, privately held, family owned company.

Q Yes, and what varieties of commodities does your family grow?

A We're basically just about equally divided between peaches, plums, nectarines and grapes.

Q And approximately how much acres in total does your family grow?

A 6,000 acres.

[1691]

Q And those are acreage that your family owns and/or leases?

A Family owns.



Q Owns?

A Yes.

Q That's owned property?

A Yes, it is.

Q Does your family, through your family company, does it also lease property that it farms?

A No, we do not.

Q Okay. Does your family pack fruit for people other than the properties you've described?

A No, we do not.

Q Your packing house only handles and/or ships, I guess is the word—and I'll use the word handle and ship—pack, ship and handle, I'll use them interchangeably. Is that an industry term?

A Yes, yes.

Q I take it that handling or packing or shipping is a term that's used interchangeably, as opposed to growing or producing?

A Yes, I use the terminology of producer, processor, marketer.

Q So you do all—

A Fully integrated in all phases. Referring back [1692] to your question, we do have two growers—

Q Are those what are called—

A —employee related. They're also members of the—working for the family that have a small acreage and we do process for them.

Q Are those two individuals, what a shipper might normally call a "outside grower"? In other words—

A The terminology of outside grower could—could be, but—

Q In other words, a grower who is not a shareholder of the shipping company?

A That's right.

Q You only have those two small outside growers, but they are employees of your family corporation?

A Yes.

Q And—but your family corporation packs fruit off of approximately 6,000 acres?

A 6,000 acres, yes.

Q And these two small growers who work for your company, and whose fruit you also pack, they're provided with about how many acres of addition?

A A total of roughly 80 acres.

Q Okay, so a very small percentage of what you have?

A Yes.

[1693]

Q And is that grapes or tree fruit that they provide you with?

A Tree fruit.

Q Okay. Can you describe for your Honor how you got started in the tree fruit business, your history of how you got involved in this crazy business?

A Well, yes, my father and mother moved here from Oklahoma here in the late '30's and ended up with a 40 acre ranch—how much detail do you want on this? Do you want a whole life story here?

Q Just a general —

A I'll try to be as brief as possible.

Q Just a general family detail.

A And I started working at a very, very young age and saving money and acquired a ranch.

Q And how old were you when you acquired your first ranch?

A I was 17 years old.

Q While you were still in high school?

A Just after the year I graduated high school.

Q And how many acres—

A That was 30 acres.

Q You had acquired that with your earnings as a farm laborer for your father?

A That's right, a farm laborer for my father, as  
[1698] \* \* \* \* \*

Q Is it fair to say that your physical facility is probably the largest in the world?

A For just—we do—I would say yes, it is one of the largest, yes.

Q Now I would like to change the subject a bit, Mr. Gerawan.

A Sure.

Q And you just recently, I understand, received a bill in the mail from CTFA for advertising assessments, is that correct?

A Yes, we have.

Q Or, I should say for all assessments?

A That's true.

Q With respect to peaches, plums and nectarines, correct?

A Yes.

Q And approximately how much was that bill you received?

A Just under \$700,000.

Q Around \$698,000; 699,000?

A 670 to 700,000.

Q Okay. And that's your assessment for the entire harvest season of the 1989 harvest season of peaches, plums and nectarines?

A Yes, it is.

[1699]

Q That doesn't include any grape assessments?

A That does not include grapes.

Q And I understand from a data sheet that you've given me that your total assessment for the harvest season of 1988, with respect to peach, plum and nectarine billings from CTFA amounted to approximately \$490,000; is that correct

A Yes, it is.

Q And that your total assessment from CTFA with respect to peaches, plums and nectarines for the harvest season of '87, was approximately \$533,000?

A Yes.

Q And that your total assessment for the harvest season, 1986, for peaches, plums and nectarines was approximately \$262,000 and some odd?

A Yes, it is.

Q And that your total assessment for peaches, plums and nectarines from CTFA for the harvest season '85 was approximately \$397,000?

A That correct.

Q And that your total assessment for peaches, plums and nectarines for the harvest season 1984 was approximately \$370,500.

A Correct.

Q And that your total assessment for peaches [1700] plums and nectarines for the harvest season, 1983 was approximately \$295,000.

A Correct.

Q And for harvest season—

A That was the total, Tom.

Q Total, 295,000. And for '82 harvest, approximately \$234,500?

A Right.

Q And the last one for harvest season, 1981, approximately \$244,00 for peaches, plums and nectarines en toto.

A Correct. And what did that total? Is there a total—

Q Yes, that totals for '81 through and including '88, that totals almost \$3 million.

A Correct.

Q Plus the bill that you've just received for the '89 harvest of almost 700,000?

A Correct.

Q So, in essence, for the last eight or nine years, you've been billed approximately \$3.7 million?

A Correct.

Q And just peaches, plums and nectarines, not grapes.

A That's correct.

[1701]

Q Now, Mr. Gerawan, I take it you understand that approximately half the assessments that you're being billed and paying go to advertising?

A That is correct.

Q Do you want to pay CTFA any money to advertise for you?

A Of course not.

Q Pardon me?

A Of course not.

Q Why not?

A Well, I guess I have to consider, you know, some philosophy here and I'll enter into it. I'm a firm believer in the system that was being created here. I believe in it. I'm a constitutionalist. I'm an individualist. I don't exist for anybody else. I exist solely for myself.



And my main purpose is to be free in a country, to do and grow what I wish to grow. Process it in the way I wish to process it and market it the way I wish to market it. I don't believe in doing it in association with anybody. I believe in doing it by myself with my family and nobody else.

I don't believe in any socialistic endeavors or I don't need anybody or any association to do anything for me. I don't wish to do anything for them, nor do I ask [1702] anybody to do anything for me. I wish to be left alone. If growers wish to associate, then they should form their own cooperatives, if they feel they're too small. And grow in direct competition with me, or I'll grow in competition with them.

I believe in the survival of the fittest and that's what this country was based on and that's what it was built on. Marketing Orders have become—are creating a breeding ground for the parasitical individuals that wish to feed upon it. And I don't wish to be part of them. Am I answering your question?

Q Yes. Let me ask a few more particular questions in that regard. Can you explain to her Honor, the term generic advertising as opposed to specific brand label advertising, as that term is used in the industry.

A Specific brand label advertising, of course, is what we do.

Q Your company does?

A Our company. We promote our own produce. I wish to use what I work for, what my endeavors go for, I wish to retain it. And I use it for my own endeavors and not for the endeavors of others. We are

fully capable of advertising our product and promoting our produce and being successful in that method.

We would be more successful and we would be—[1703] and we are fully capable of promoting our own product and advertising it.

Q So—

A And this is what we wish to do. I don't want to, nor have any desire to continue to put money into a fund that others feel that they wish to control and where it's—and certain individuals that come along and make claims that they are doing good for the industry, which in fact, it's basically their own selfish needs that are being served. And anybody's needs that are being served by themselves individually I have no qualm with or fight with. Any individual that wishes to enter into the arena of free enterprise, it's there to enter into, individually.

But to form an association under the guise of a Marketing Order or to use any tool that some social group has decided that is needed to bring into control product and enter into the destruction of one of the basic laws that we've had since time began, the law of supply and demand, and once that's tampered with, we've created a warped market.

And that's what we have done. I can recall some years ago when the cling peach people, working under a Marketing Order, decided that they wanted to enter in with certain control, so they created what they called a green drop. So they decided that according to the size of the [1704] crop that they would drop every seventh row. Percentage wise, one-seventh—I don't know what that comes to, but—my mathematics are not that highly educated. So that worked pretty well,



so they got a good price for the six—every, you know, the six rows that remained. So, but eventually, when they had to go to every fifth row and then they had to drop every fourth row, and then it started getting out of hand.

So then these brilliant people decided they were going to enter into—have a control to control the control. And then they came in with what they call tree credits. And somebody dreamt up some formulation where certain tree credits—you know, and so the it resulted—I don't know where the cling peach deal is right now.

You always have these things that come along to try to—they're created, for what, the benefit of humanity. We live in a world where whoever else wants to be here, we're taught it's all for one and one for all. I don't believe in that.

Q So what do you believe in?

A I believe I'm here for myself and nobody else. I'm not here for anybody else but myself. And I believe that—in a free system—I'm not here to promote any other grower. My intent is to run the other grower out of business. That's what the game's played; I mean that's [1705] part of the game. I mean—it's one big ring, you try and stay in the ring. If you get knocked out of the ring, well that's the way it is. And that's the way life is. And that's what I believe in.

Q Now you—you've mentioned something that I thought was kind of interesting. Is your type of packing house different than other types of packing houses that might wish generic advertising rather than specific brand label advertising?

A Well —

Q You said that certain individuals like it.

A Yeah, there are individuals. There are commercial packers—

Q And what's a commercial packer?

A A commercial packer is a packer that's packing for a grower, okay? And his main endeavor is to get packages in. He's after a package count, because the higher his package count, the more money he's going to make.

Q He wants a lot of outside growers?

A Definitely. He wants as many outside growers as he can bring in. And I think you'll find that within this system that's been created, this Marketing Order, that it's pretty much run by commercial packers. And for whatever—for my reasoning and of course this is an [1706] assumption on my part and I think it's pretty factual that all of a sudden, a grower is—he's being assessed—

Q By CTFA?

A —by CTFA for promotion, okay. And if you look at them in acreage, per acre basis, if there's a thousand packages produced an acre, which would be an average in tree fruit, and you put 10 or 11 cents to that, you're looking at \$100 per acre that's assessed for loading up produce.

Then he takes it into a commercial packer and then the commercial packer charges him eight to ten percent for marketing that product that he's promoting. Now, that doesn't make any sense to me. If the grower is going to promote the product and also pay

eight to ten percent to market it, shouldn't the guy that's marketing it, promote it? But yet, that assessment is there.

But we've entered into something here that is—that is starting to really get a stench to it. The Marketing Order came into effect, I think it was established in 1937. Well, it's gone through a couple of generations now where Marketing Orders have become a way of life. Growers I feel don't really understand what the—I mean, in other words, they've lived under this blanket for so long, they don't really understand what's really happening.

[1707] And as socialism continues to creep, it sort of starts to become a way of life. And there's something uncomfortable about it, but they don't really know what it is.

Q I see.

A And—but commercial packers—

Q Now is commercial packer—would be—as opposed to a family independent packer, as to yourself?

A That's correct. Right.

Q And you talked about you promote your own label. What is your label's name?

A Prima—Prima Label. We advertise it ourselves. We put a lot of money into it. We put money that we're paying into an association to promote our own product. I'm not—I don't want to go out there. There's another packer that there's a promotion being run on Red Jim Nectarines.

Q Jim Ito?

A Jim Ito, yes. We're paying, as a grower, I'm paying to promote Red Jim Nectarines, which is an exclusive variety of Mr. Ito's. I don't have the right to grow the Red Jim unless it's under his method, yet I'm paying to promote Red Jim Nectarines. I don't want anybody to promote Prima Red Nectarines. I wouldn't even allow it to go in there.

[1708]

Q Are you—are you telling me that generic advertising money that's assessed and taxed from your family is being spend by CTFA to promote varieties that the patents are exclusively proprietary?

A I'm not telling you that—it tells you right there in that chart.

Q Okay.

MR. CAMPAGNE: Your Honor, with you permission, I'd like to mark this document next in order, which I believe the next in order—

JUDGE BAKER: 256.

MR. CAMPAGNE: Is 256, yes.

(The document referred to was marked as Petitioner Wileman, et al.'s Exhibit No. 256 for identification.)

BY MR. CAMPAGNE:

Q Mr. Gerawan, I'd like to show you Exhibit No. 256. Mr. Gerawan, I believe the first time I ever saw this, you were storming in my office and screaming about this—

A I got pretty hot about that one.

Q Can you explain to the judge why you got so hot about this CTFA advertising document?

A What you see here is—this would be the— [1709] this is the nectarines and what you'll see here is this variety of Red Jim, okay. And you'll see it in dark red coloring here and above it you'll see Flamekist. It's presented in a lighter color. And you'll see Fairlane sort of presented in a lighter color. The colors that are used can be argued that they're really not trying to substantiate the color of the fruit, but yet there is variations there that are used. In particular—

JUDGE BAKER: There's no particular relationship to the colors of the fruit?

THE WITNESS: Not necessarily. Of course there—there—they used a color scheme here. And I don't know what, you know, what the purpose of the whole color scheme was. But what's really happening here, your Honor, is that Red Jim Nectarine is a—become an prominent variety by an individual, Jim Ito. And it's a very good variety. And he has every right in the world to grow as much of it as he wants to grow. And he has every right in the world to market it in any way he wants to market it.

BY MR. CAMPAGNE:

Q To advertise it?

A He can advertise it; he can do anything he wants with it.

Q But you don't want to—

A He has been very effective with the Red Jim [1710] Nectarine of—of—of—because it comes in the

same time season that we have Fairlanes and Flamekist and other varieties—

Q That you grow?

A —that we grow. And he has been very effective in marketing them. And he's done a tremendous job in promoting it and marketing it. And he's been a real competitor, because the varieties that we've had, we've taken a hind seat on him because he's done a tremendous job. And that's the way it should be. And I take my hat off to Mr. Ito. But I don't particular care to promote the Red Jim—

Q With your money?

A —with my money. And that's what's happening today. And this is the type of favoritism—or whatever you want to call it, and I don't want to get into that area. But I mean, we have a situation here and this is not healthy. The healthy part of it is that Mr. Ito came in with a variety—and I take my hat off to him—and done a tremendous job with it. And he has a tremendous volume of Red Jim Nectarines. Tremendous volume. And he has hurt us with our varieties.

Q He—

[1711]

A And that's the way the game's supposed to be played.

Q Competition.

A Right. But I want my money so I can promote Prima Red Nectarines. I don't want an association to promote my label. I want to promote it. I want to promote Prima Red. We launched our own program



last year in Prima Red Nectarines. But yet I get a bill, which I have no intention of paying, for—

Q An approximate \$700,000 bill.

A —\$700,000 to promote my competitor's fruit.

THE WITNESS: Help me to raise my voice, too.

I haven't cussed yet.

BY MR. CAMPAGNE:

Q I understand this is a little bit malicious. Mr. Gerawan, do you have an understanding where this exhibit was distributed by CFTA?

A Where it was distributed?

Q Yeah, did you talk to somebody at CTFA about it?

A Yes, I talked—

Q Or should I say did you scream at somebody at CTFA about it?

A Oh, I talked—I was very nice about it.

Q Where do you understand this was distributed by [1712] CTFA?

A This document was placed into the packer newspaper.

Q Is that a—is that a—

A It's a nationally distributed newspaper weekly that goes out to all produce buyers and handlers of product.

Q Okay.

A So there was complete national distribution of this.

Q Was it also given to like grocery stores and buyers for chain stores?

A I don't know the exact extent of its distribution. But I do see Red Jim on there and it was advertised. And I have no intention of paying for that advertisement.

Q Now you were talking about the colors and if I understood you correctly, you're assuming that the way the colors were set up gives the impression to the public that the Red Jim is redder in color than the Flamekist and the Fairlanes that you grow?

A Yeah, I mean, that would be—yeah, that kind of upsets me. But yet you look on up here and you'll see that Fantasia is given a higher color than Summer Grand, which is erroneous.

[1713]

Q And I take it—

A So that I've got both of these varieties and I have a lot of Fantasia's, you know. But —

Q And I understand that your company—if I understand what you've told me before, correctly, your company spends a little bit more money than some companies do to try to enhance the color on certain varieties by stripping the leaves off the trees when other farmers might not do that.

A Yes, we do. I feel that my sons have been instrumental in taking varieties and bringing them way above the standards that are even professed that we have to deal with, as far as color chips and all of that paraphernalia is concerned, because we're individuals. We're in a marketplace of our own—



Q With your own buyers—

A We don't recognize CTFA. We don't recognize their standards. We have no recognition. We feel that as individuals we're fully capable of understanding the market's needs. We're dealing with a one-to-one—it's on a one-to-one. We sell to a buyer. That transaction is strictly the business of myself, who we are and the buyer that buys it. It isn't nobody's business.

If I wish to grow 5 x 5 Red Beauts, that transaction is only my business and the buyer's. If he [1714] choses to buy them, that's his business.

Q Mr. Gerawan, changing the subject just a moment, you—you made a statement earlier that I would like you to elaborate on. You said that for some years, you've been promoting your own Prima Label. And spending your own money out of your own pocket.

Let me ask you a question. If you weren't spending money previously paying almost \$3 million from 1981 through 1988 to CTFA, would you have spent more money promoting your own label?

A Definitely.

THE REPORTER: Excuse me, your Honor. Go ahead.

MR. CAMPAGNE: Thank you.

BY MR. CAMPAGNE:

Q And also, Mr. Gerawan, I know you and I had a conversation about the First Amendment. Do you think that your ability to speak in the advertising market is being diminished by CTFA taking your money from you and promoting the generic, "Eat California Fruit"?

A Oh, there's no doubt about it, there's a definite burden placed on us by this huge amount of assessment.

Q Do you have budget limitations in your company?

A Definitely.

[1715]

Q And, as a result —

A We are —

Q — has your Prima specific brand label advertising program being diminished, as a result of the money that CTFA has taken from you?

A There's no doubt about it. Any, you know, any—\$700,000 is a lot of money.

Q And how much—

A It would allow us opportunities to go into more promotional programs and more advertising and we're interested strictly in Prima. We're not interested in Red Jim; we're not interested in anybody else. I have no desire to be interested in anything but Prima.

Q You don't think it helps your company to spend—for the industry through CTFA to spend \$5 million a year saying, "Eat California Fruits"?

A No.

Q Why not?

A It does no good whatsoever. And—

Q Do you think it would help the automobile industry to advertise to buy cars?

A No. I mean, everything —

Q Do you think it would help the beer industry to say, "Buy beer"?

A We're not Russia. We're in the United States. [1716] And we're independent; we're individualistic. And, you know, I think we need Gorbachov over here to get us straightened out.

Q How much money do you feel that—I understand that from what you've told the office before today that in 1986, just promoting the Prima Label through Gerawan advertising and newspapers and promotional documents, that in 1986, you spent approximately \$80,000 of your family's money promoting the Prima Label, is that true? Not counting your staff time and all that stuff?

A Yes.

Q Just hard money out of pocket for buying of tapes and materials and newspaper print, that type of thing. And I understand that in harvest season '87—I just said for harvest season 86—so for harvest season '87, you spent about 53, 54,000 of hard money out of pocket buying brochures, buying newspaper ads, not counting your own company's time and employee time, promoting the Prima Label? You have to answer yes or no.

A Yes.

Q You can't just nod your head. And I understand that in 1988, you spent approximately \$61,000 of hard money buying these hard items like brochures and posters?

A Yes, we have.

Q And in the last harvest season, you spent a [1717] little bit more, approximately 70 to \$75,000?

A Yes, we have.

Q Do you think if you weren't paying CTFA approximately \$700,000, that that personal family advertising budget for the Prima Label might increase?

A Very definitely. Very definitely. We launched a program of Prima Red Nectarines which we were successful with this year and I would like to, and intend to increase that and put more money into it. But I need money we're working for. I don't need to promote any other grower's product. Or, I'm not here for the good of the industry.

Q Now I understand that with—I understand that you attribute some of your success to your ability to promote Prima's Label?

A That's right.

Q And it's helped you grow?

A That's right.

Q And you don't think that CTFA "Buy California Fruits" has helped you at all?

A None whatsoever. I mean the market is strictly a supply and demand market. And even this last season, there are growers that quit harvesting certain varieties of fruit because the market didn't want it. It was glutted. The market has a way of finding and seeking its own level. We don't need people to come up with programs to start [1718] eliminating certain sizes. We don't need an association to advertise it. The market seeks its level. And it's—it's a man's game. It's—I don't know, I—

Q It's a tough business.

A I'm on the verge of starting to cuss. Slow down just a little bit.

Q Well, Mr. Gerawan, I understand that with some of this money that you've been spending, in addition to the money you've been paying CTFA up through the current harvest season, that you've done such things as produced tape—video tapes and movies?

A That's right, we have our own video tape going. We want to do more things. But it—advertising, individual advertising is what we want to do.

Q And, Mr. Gerawan, we've set up the demonstration of your video tape and—

A You have my permission to show it.

MR. CAMPAGNE: With your Honor's permission as well, your Honor, we would like to play the video tape as an example of what Mr. Gerawan has done to promote his own specific brand. And then we will provide with the exhibits, the tape amended to all the exhibits.

JUDGE BAKER: Very well, thank you.

MR. CAMPAGNE: Thank you.

MR. COOPER: Your Honor —

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UNITED STATES DEPARTMENT OF  
AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

AMA DOCKET No. F&V 916-3

AMA DOCKET No. F&V 917-4

IN THE MATTER OF WILEMAN BROTHERS & ELLIOTT,  
INC., A CALIFORNIA CORPORATION AND KASH, INC.,  
A CALIFORNIA CORPORATION, PETITIONERS

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,  
RESPONDENT

Federal Building

1130 "O" Street

Room 2002

Fresno, California

Thursday, February 1, 1990

[Excerpts from testimony of Ray Gerawan]

The above-entitled matter came on for hearing, pursuant to Notice, before the Secretary of Agriculture, at 9:05 a.m.

Before:

HONORABLE DOROTHEA A. BAKER,  
Administrative Law Judge  
Room 1045 South Building  
Washington, D.C. 20250  
(202) 447-8305



[1735]

## PROCEEDINGS

(9:05 a.m.)

JUDGE BAKER: We are now back in order after our evening recess. This is Thursday, February 1, 1990 and Mr. Campagne, do you wish to continue?

MR. CAMPAGNE: Yes, your Honor. Whereupon,

RAYMOND GERAWAN

having been previously duly sworn, the witness resumed the stand and was examined and testified further as follows:

## DIRECT EXAMINATION

BY MR. CAMPAGNE:

Q Mr. Gerawan, I believe you will recall that when we had recessed for evening recess last night, you had just finished speaking about Exhibit number 256 which is the CTFA advertising document and we had just played the music of the Prima label of the promotional tape that you produced which is Exhibit 258.

Now if I may Mr. Gerawan, I'd like to change the subject just a little bit and I would like you to describe a little bit more for her Honor what you feel you would do with the approximate seven hundred thousand dollars a year you are paying in assessments and of that about half of it would be advertising [1736] assessments.

In other words, I would like to ask you what would you do with the approximate three to four hundred thousand dollars of advertising money, if you didn't have to pay it each year to the CTFA? How would you use that with respect to your Prima label?

MR. COOPER: Objection, your Honor. He said yesterday that he's not paying the money, it's a little unclear.

MR. CAMPAGNE: He's testified that he's paid over two point million, almost three million dollars in the last year in assessments of which over fifty percent of that, actually five ninths of that is advertising assessments, so in the last eight years he spend a lot of money in advertising assessments being the largest shipper in the industry.

JUDGE BAKER: The objection is overruled. It's quite clear what the witness is being asked.

BY MR. CAMPAGNE:

Q What would you do with that advertising money, Mr. Gerawan, if you didn't have to give receipts to the CTFA? How would you put it into your Prima program that you were talking about yesterday?

A It would be similar to any other organization which has a product which is promoted.

Q Like Chrysler or—

A Whatever it may be whether it's donuts or whether it's cars or whatever it may be. In the Gerawan family we'd use this money to promote Prima label, not to promote California fruit. We're interested only in Prima label, as I stated earlier, we're not interested in promoting anybody else's fruit and we would put it into promotional programs and I think that you'll find that competition is really the essence in any business.



It's part of the free enterprise system and competition has come along and created as a result their own promotional programs which has hurt us in particular periods and that's the way it should be. So we would, in turn, use our money to promote Prima label.

Q Like for example, what would be an example of some competition you'd—

A For example, Mr. Ito has been very successful in promoting the Red Jim nectarine and its even gotten to the point where the Red Jim, being promoted, and in talking to certain chain store buyers, even though we have nectarines that are comparable color and quality, at the same time of the year the buyer would say, "yes, but they're not Red Jims." And the chain stores and the buyers have been very successful because of this promotion that Mr. Ito put out. So we, [1738] in turn, this last season put out a Prima Red nectarine.

Q This is a promotional trade mark name?

A It's promotional trade mark name and it is not a variety but the Prima Red is a program which we use several varieties that go into the Prima Red program. First of all, the Prima Red has to meet a criteria of seventy-five percent or more of color.

Q With your own internal standards?

A That's right, definitely. Everything, all of our standards are our own internal standards.

Q They're not CTFA standards?

A No, they are not.

Q And, for example, the inspectors I saw in the movie yesterday, those were your inspectors, not CTFA?

A That is correct, that is correct. So we put out what we call a Prima Red program. So we have to

promote this and you will find, and I think it's factual within—we're talking about items such as fruit—that a person that hears "buy California fruit" they won't all of a sudden stop their car and just go in and buy California fruit.

The greatest majority of fruit that is consumed and sold is done through promotional participation primarily by your chain stores and what a [1739] promotion is—

Q Excuse me, what do you mean by "participation with the chain stores," I don't understand that phrase?

A Well, here is a participation—participational promotions are for example, Prima Red nectarine. We will commit a price to a buyer—

Q In advance of the harvest?

A In advance of the harvest of so many packages of fruit, we will rebate back to that particular buyer a promotional allowance with proof of ad that they put out into their advertisements. We will rebate on a particular Prima Red program, we rebated two cents a pound which is a significant amount of money. Others—a price that is set and they want a promotion. They set up within their stores the amount of space and this is to use a tremendous volume of fruit. We have to meet, certainly, the criteria of what we're advertising and this is what is called a "promotion."

Mr. Ito has been very successful at it and that's not unique. There is nothing unique about what we're doing but the competition has forced us to also enter into that arena. And we're—our main goal is to promote Prima label, you know.

Q Let me ask you just a little bit more [1740] explanation with regard to this cooperation with the

chain stores in this rebate program. If I understand what you're saying then, sometime before the harvest, possibly even months before the harvest, you have an arrangement with the chain store?

A Yes.

Q That when you say Safeway has a full page ad in the newspaper, they'll use the Prima Red logo in the advertisement, is that it?

A That's right.

Q And certain displays are put up in the stores?

A That's right.

Q And they say "Prima Red"?

A That's right.

Q And then if they show you proof of having done all this, you give them the rebate?

A That's right.

Q And you consider that one of the most effective means of advertising?

A Definitely.

Q Do you think that a jingle on the TV or the radio that says "eat California fruit," is effective?

A No, it has no meaning whatsoever. [1741]

Q You think it's just an absolute waste of money?

A I absolutely,—yes. We're dealing with a supply and demand situation and I think it's up to free enterprise to step in, individuals such as Jim Ito or Gerawan or whatever company, or who wish to form our own cooperative, that's fine, but I think what we're really talking about here is the first amendment which allows us freedom of speech. Also allows us freedom not to speak. And we don't wish to speak, we don't wish to have our money used and being forced to speak when we don't want to speak.

Q On behalf of your competitors?

A On behalf of our competitors. I'm not interested in promoting any other grower. I'm only interested in promoting myself.

Q Can you think of any governmental interest whatsoever as to why the government would care whether or not the American public needs California nectarine peaches and plums?

A No, I can't think of any instance of why the government would even care if people eat donuts. I mean, maybe they'll come along with a donut marketing order where you can only have a certain size donuts and the centers of donuts—I don't—where does this [1742] whole thing go? I'm not here to feed anybody's alter ego—

Q What do you mean, "alter ego"?

A Alter ego in association with people that feel that they're do-gooders to the industry and all of a sudden they've taken something, served their own alter ego and their own self-interest in creating controls. Let them do it on their own. Let the free spirit of competition and free enterprise continue.

And I think Mr. Ito has done a tremendous job as a competitor and I take my hat off to him. And I think he's instigated something and I think the volume of fruit that is consumed is predicated upon the chain stores and advertising at their level and the ads and the promotions.

In general on TV or radio, "eat California fruit" is a pure waste of money and if people wish to do this, let them do it on their own. I don't want to be forced into putting any of my money into a program which I don't believe in at all.

Q So, if these people voluntarily contribute money to a cooperative plan to advertise, you don't care as long as you're not taxed to forcibly pay into that?



A That's right.

Q On this Jim Ito, Red Jim variety that's [1743] shown on this piece of paper which we've marked as Exhibit 257, I'm sorry, 256, is the patent on that nectarine different than the patent on other nectarines?

In other words—

A I don't believe it is.

Q Okay, let me rephrase the question. The Red Jim nectarine is patented by—but the owner of that patent is Mr. Ito, is that correct?

A Yes.

Q And he has not made that tree available for sale or to anybody who's willing to pay the royalties, isn't that correct? He's limited—

A I don't know what his total program is, I know that what variety is grown exclusively by Jim Ito and growers that Jim Ito—that grow for Jim Ito. I don't know what his arrangements are—

Q Is it fair to say that if I'm growing a Red Jim nectarine tree, that lawfully under my contractual arrangement with the patent owner, Mr. Ito, only Mr. Ito can pack and market that tree—

A If this is his arrangement and I'm not completely familiar with the laws that protect those owners patent rights, I know within our organization that we have our own patent varieties and we wish to promote those very similar to what Mr. Ito is doing. [1744]

Q Now your own patented varieties, do you sometimes make them available to other packing houses to market or did you just market them?

A No, we retained our own varieties exclusively. We have developed those varieties. Mike Gerawan

heads our breeding department. They are our exclusive varieties.

Q Just like Red Jim is for Mr. Ito?

A That's right.

Q And the—

A And the May is for Fowler packing, or very similar.

Q I see. Now, I guess we'll call those exclusively patented varieties. Do you also handle and ship some non exclusively patented varieties? Your company?

A Yes.

Q And can you explain to the judge the difference?

A Well, the difference is that there are varieties—a patent, I think the life of a patent is seventeen years. And once that seventeen years is up, well then it becomes open to anybody who wishes to grow that particular variety. Within that period of seventeen years, it can be exclusively held by a [1745] grower—

Q Or that grower can let someone else—

A —or nurseries who have developed these varieties will sell trees and have a royalty. Or that grower can make arrangements with a packer or whoever, the grower can make arrangements with others to grow that variety under exclusive contractual agreement.

Q Marketing agreement?

A Marketing agreement, packing agreement, whatever there may be that constitutes that agreement. This is not unique within our industry. I think that that's very similar, I believe, to other industries. I'm not sure exactly how its operated.

Q Well, I'd like you, Mr. Gerawan to look over this chart which is 256, Exhibit 256 and—the varieties that are listed there. And, can you tell me if there is any variety—you've already told us that Red Jim is a

variety of nectarines on there that was under exclusive ownership of, I'm sorry—

A That's right, the other variety is—is a patent held by Burchell nursery which is sold commercially, the Sparkle, I believe—

Q In other words, anybody can go buy that tree and—

A That's right.

[1746]

Q —and anybody can market it?

A That's right. Very similar to the Sparkle and the O'Henry, Cal Red, I believe is a variety that was developed by USDA.

Q So anybody can buy it and market it?

A Yes, anybody can buy any of these trees or varieties—

Q Except—

A —on this list—

Q Except for Red Jim?

A Except for Red Jim. Angelino was a variety that was held by Superior Farming but the patent has run out on it and it is open variety right now.

Q That's a variety of plums?

A That's a variety of plums, yes. Many of these varieties, such as Grand Rosa, that was a variety held by Reedley nursery at one time, but that's for anybody to buy. The only variety on here that I could not buy and participate in would be the Red Jim.

Q I see. And is that what is commonly referred, therefore, in the industry as a proprietary variety?

A Yes.

Q So there's no other proprietary varieties on there except the Red Jim?

[1747]

A That's correct.

Q Are any of your proprietary varieties on there?

A No, there are not.

Q Has CTFA ever included your proprietary varieties on any of their brochures?

A No.

Q Mr. Gerawan, you recently had a 15(A) hearing before Judge Palmer, correct?

A Yes.

Q And your Honor, I'll represent for the record that Mr. Gerawan's case Gerawan Company, Inc. as petitioner has AMA docket F&V 916-4 and 917-5. Mr. Gerawan, the last day of that hearing was May 31, 1989?

A I believe it was, yes.

Q Your Honor, may we have just a moment to confer—

JUDGE BAKER: Yes.

BY MR. CAMPAGNE:

Q Mr. Gerawan, is it fair to say that the document in front of you, the CTFA chart that we've marked as Exhibit 256 was issued and distributed and therefore you came running into my office screaming, just a few days after that hearing of May 31st?

[1748]

A Yes, that's right. Yes, that is.

Q Is it fair to say that you received it as being circulated in the industry the first week of June?

A I don't recall as to the exact timing of it, but it's fair to say that it was distributed within the season of 1989.

Q But do you recall it being shortly after your trial?

A Yes.

MR. CAMPAGNE: Your Honor, with the court's permission I am now going to hand Mr. Cooper and



Mr. Palmer a copy of a few pages out of the transcript of that court proceeding and I'll have a set for you as well.

JUDGE BAKER: You meant Ms. Boutrous?

MR. CAMPAGNE: I'm sorry, Ms. Boutrous and Mr. Cooper. And your Honor I want the record to reflect that I'm also handling you copies of pages 203, 204, 222, and 223 of the transcript of proceedings in the matter of Gerawan and Company, Inc., case number 916-4 and 917-5, from the transcript dated May 31, 1989. It was only a one day proceeding, your Honor. And these are pages exerted from the testimony of Mr. Jon Field, your Honor. The witness referred to Mr. Jon Field in these pages. And if I could possibly have these pages 203, 204, 222, [1749] and 223 marked next in order—

JUDGE BAKER: 258.

MR. CAMPAGNE: That's 258, thank you and the records should reflect that over the word "the witness" I'm just writing in the name Jon Field. Thank you your Honor.

(The document referred to was marked as Exhibit 258 for identification.)

(Witness proffered documents)

MR. COOPER: Is there something different you have there Mr. Campagne?

MR. CAMPAGNE: Pardon?

MR. COOPER: Is there something different that you handed us?

MR. CAMPAGNE: No, it the same thing—the same thing I just handed to you. For the record, your Honor, I'd like to move these documents into evidence later on but not right now. I would like to just ask a few questions about them with your permission.

BY MR. CAMPAGNE:

Q Do you recall Mr. Jon Field's testimony at the trial, Mr. Gerawan, to the effect that it was inappropriate of CTFA to advertise proprietary varieties [1750] and the CTFA had not done so?

A Yes, I do recall that briefly, yes.

Q And is that one of the reasons why shortly after the trial when Exhibit 256 came out you were particularly angry?

A That was one—might have been one of the minor reasons because of the statement that he made I think it's rather a blatant act of the CTFA to take the exclusive variety and spend my money advertising it. That is the act that I acted on.

MR. CAMPAGNE: Your Honor, I'd like to point out to you that on page 222 of the transcript—I should clarify something for the record, your Honor. That page is 203 and 204 of this exhibit, the transcript exhibit, that is where Ms. Boutrous is examining Mr. Fields. Mr. Jon Fields, And pages, 222 and 223 is where I'm examining Mr. Fields. And I would like to point out on line 16, page 222, I asked Mr. Fields as follows: quote, that you listed varieties that are particularly patented for other handlers, isn't that true? Answer Mr. Fields, "which ones, Red Jim has never been listed." Question, "Red Jim has never been advertised"? Answer, "it has not been listed in those programs." Question, "has it ever been advertised"? Answer, "not specifically by our programs, quite [1751] possibly the same as the Prima label where an individual retailer in our program might have advertised the Red Jim variety and got points because of the advertisement." Question, "what you're saying is, in these advertising brochures themselves, you never advertised any varieties that are patented

solely for other handlers"? Answer, "the proprietary independent varieties, not that I'm aware of." Question, "by me—" Answer, "handled by one individual, not that I'm aware of." Question by me, "okay, they have to be open varieties"? Answer, "yes, yeah." Question, "open patent varieties"? Answer, "we try to stick with that which becomes more and more difficult all the time."

Excuse me a moment, your Honor, Your Honor, just so the record is clear, at this time I'm showing Mr. Cooper and Ms. Boutrous a document which is the referred to a 203 and 204 of the transcript that was just identified as Exhibit 258. And this document being, your Honor, what was referred to therein in that transcript as Respondent USDA Exhibit 257, which with the court's permission I'd like to mark as Exhibit 259 in the interference.

(The document referred to was marked as Exhibit 259 for identification.)

[1752]

MR. CAMPAGNE: With respect to Exhibit 259 in this hearing, which was Exhibit 57 as referred to in the Gerawan transcript as Exhibit 258, I'd like to read this portion of the transcript. At pages 203 and 204, Ms. Boutrous is examining Mr. Jonathan Field as her witness and she is showing Mr. Field what was in that proceeding, USDA Exhibit 57 in which is in this proceeding Exhibit 258, and you will note your Honor that it is a similar type of advertising brochure as the instant one that is in front of Mr. Gerawan as 256. However, the brochure had been published some months earlier, not listing the Red Jim—

JUDGE BAKER: Mr. Champagne, may I inquire who is Mr. Flynn on pages 203 and 204?

MS. BOUTROUS: He is the attorney that was working with me, your Honor.

JUDGE BAKER: Oh, —thank you.

MR. CAMPAGNE: Your Honor, on page two and three, after the document is talked about being marked as Exhibit 57, Mr. Jonathan Field—where it says, the witness there on line 15 on page 203 of Exhibit 258 states: The witness, "actually what you have in your hand is a variety chart and a variety chart, if you open that up, it shows product availability as a major variety by timing and it also shows some pictures of [1835] program?"

A Yes, that's the basic thrust of my argument. It is not helping me and I don't want my dollars being spent for me by a committee or anybody else. I will spend my own dollars on what I created and what I produce. Because it is proven that free enterprise and private industry is the essence of this whole thing.

They don't generically advertise cars. Generic advertisement, I'm not interested in. I'm interested in advertising that I, as an individual produce in my label. I'm not interested in putting my money in anybody else's advertising program. I have the right as a grower to grow what I wish to grow.

Q So you feel that the advertising dollar is not spent effectively. Do you feel that the advertising dollar—by CTFA is being expended to spread some sort of particular message that would be against your business.

A I see there is no point here. I don't care what CTFA does with their money. I just don't want any of my money in it. I just don't want any of my money used. It's—whether it's effective to them or not is of no concern to anybody. What I'm saying is if growers want to form their own coops and they want to be



[1836] competitive with Ito, then God bless them, go for it. If they want to be competitive with Prima, go for it. I guess we're really—its not a question whether CTFA is effective or not effective for anybody else. They're not effective for me, they're a hinderance to me. I'm not here to judge what they do for somebody else.

Q Well, would you say, you mean your advertising dollars—in the past you spent x sum of dollars that went to advertising, did any of that money go to advertising which would say directly be—for instance, let me phrase it another way. If I could characterize CTFA advertising, it's basically, eat fruit, eat a lot of fruit, fruit is good for you and CTFA in general pushes big fruit, high maturity fruit—

MR. CAMPAGNE: I'm going to object, your Honor. I think we've all been accepting the premise that CTFA advertising is quote California fruit close quote. And I think there is some mischaracterization going on in the phrasing of the question. In Mr. Gerawan's position, he's previously testified that he believes it violates his first amendment rights to take his money to promote his competitors fruit. He wants his money left alone so he can promote his own fruit. He [1876] Kashiki's fruit, it could be anyone—

A But if it was my—if it was my fruit and I'm retaining my money to promote my fruit, you will well know it was Prima fruit. And that's how industries are built. That's how—that's free enterprise. And that's how people become successful. We've got to get out of the area of mediocrity. Generic advertising throws everything into mediocrity. It keeps everything—wants to leave everybody common. It doesn't determine the best out of mediocrity. We want to promote Prima. I'm not concerned about

anybody else fruit. I'm not concerned whether they stay in business or whether they are successful or whether they sell another peach or not, that's of no concern of mine whatsoever. Whether they survive economically is no concern of mine.

Q Doesn't allowing a lower quality fruit on the store shelves hurt you in that the next time I go in there I won't look to see whether it's Prima, I won't look to see whether it's Topshelf, I won't look to see whether it's Kashiki, I'll just go, you know, to find some oranges or some apples, or something because I got burned the last time I was in there.

A That's because you listen to the California Tree Food ad—[1877]

Q I didn't listen to the ad, I just saw the peach that was on the counter without a name.

A You saw peaches from California.

Q I saw peaches and I assumed they were from California because it was the wrong season—

A If you'd bought some Prima fruit, you'd been back to buy more. That's the gist of the whole thing. I don't know what kind of car you drive, but if you like the last car you bought, you're going to buy another one.

MR. COOPER: Do you have anything else?

MS. BOUTROUS: Yes, I want to ask one quick question. I remember—

MR. COOPER: I have nothing further.

MS. BOUTROUS: Okay, one quick one, then we'll be done.

BY MS. BOUTROUS:

Q I think the variety is Fantasia, but you were mentioning at one time you were angry because the color chip was lowered. I think it was on Fantasias. Do you remember the time you were angry when the



went in and they lowered the color chip. Weren't you angry because now there is going to be fruit at a lot lower maturity coming in and flooding the market and dragging down the market and making everybody think now there— [1880] itself?

A Yes. One out of every five pieces of fruit I ship has that sticker, I believe.

Q And I take it then that kind of gets mixed up sometimes with fruit that doesn't have stickers.

A Yes.

Q Hopefully they can stick their noses to the Prima pile of fruit in the store, right?

A Right.

Q Mr. Gerawan, you in answer to one of Mr. Cooper's questions said that "eat California fruit," you said it was a lie that you philosophically—the jingle or the generic advertising phrase or the generic advertising theme of quote eat California nectarines, eat California plums, eat California peaches, you said it was a lie, that generic advertising was a lie that you philosophically disagreed with and you started to explain that a little bit. I think you got cut off, would you elaborate on that please?

A Well, actually the connotation of the generic advertising is that California fruit is all the same and it isn't all the same.

Q Is that the lie you're referring to?

A Yes.

Q Can you please explain why it's not all [1881]

A Well the reason it's not all the same is because there are differences in quality. All California fruit is not the same. And that's—to say it's all the same is—it just isn't. California fruit is not all the same.

Fantasia nectarines,—is—not all Fantasia nectarines are the same. Not all varieties are the same.

Q So not only are their differences between say a Fantasia nectarine and a LeGrand nectarine, but there's differences among different Fantasias and different LeGrand?

A Each variety has it's own characteristics and there's differences between qualities, between growers, and areas and all California is not the same.

Q As a matter of fact, Mr. Gerawan, don't you sell two levels of qualities? You sell a Prima Red-quality label and you sell a regular Prima label?

A That's correct.

Q So if I put a Fantasia and a Prima Red label of your company, that Fantasia is different than a Fantasia in a regular Prima label.

A That is correct.

Q So all Fantasia's are not the same?

A That is correct.

Q Now, Mr. Cooper asked you a question and

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[2267]

UNITED STATES OF AMERICA  
DEPARTMENT OF AGRICULTURE

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AMA No. 51  
F & V 916-3  
F & V 917-4

WILEMAN BROS & ELLIOTT, INC., A CALIFORNIA  
CORPORATION, AND KASH, INC., A CALIFORNIA  
CORPORATION, PETITIONER

*v.*

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,  
RESPONDENT

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[Excerpts from Testimony of David Parker, CTFA]

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Room 2002  
Federal Building  
1130 O Street  
Fresno, California  
Monday,  
February 5, 1990

The parties met, pursuant to the notice of the  
Judge, at 9:05 a.m.

Before: HON. DOROTHY BAKER,  
Administrative Law Judge

APPEARANCES:  
For The Petitioner:

THOMAS E. CAMPAGNE, ESQ.  
CLIFFORD C. KEMPER, ESQ.  
5108 E. Clinton Way, Suite 122  
Fresno, California 93727

Heritage Reporting Corporation  
(202) 628-4888

\* \* \* \* \*

[2280] different than some of the earlier years? Is that listed, a time chart listed varieties and had stripes across the page?

A No. The primary thing that was different was that it took the form of a free standing insert as these things are known as opposed to a printed page advertisement in a newspaper.

Q I don't know what free standing insert means. Do you mean that it just slips into the newspaper and can be taken out?

A Correct. So—

Q Like I might get an advertisement from Macy's or Nordstrom's that can be taken out of the newspaper and stored separately from the newspaper?

A Yes. That's a good way to put it. And the reason for that is that we hope to find these on retailer's office walls, which indeed we did.

Q I see.

A A reference tool for them.

Q So now, these things such as Exhibits 256, they went into newspapers as free standing—

A Inserts.

Q —inserts, and then mailed to the general public?

A They were inserted in the Packer and Produce News, and two principal trade newspapers.

Q Okay. I understand. So they were—the Packer [2281] and the Produce News, I take it, are newspapers. However, they're not newspapers of

general circulation. They're newspapers that are purchased by retailer, wholesalers, packing houses and shippers and that type of thing?

A Yes. People involved in the fresh produce industry.

Q Not necessarily the type of newspaper that a housewife might buy, but rather that a procurer or purchaser of goods might buy?

A Correct. I don't think too many housewives subscribe to either of those.

Q Okay. And had you ever done any free standing inserts into either the Packer or the Produce News before hand, before Exhibits—before the summer of 1989?

A Not during my tenure.

Q And are you aware of any before your tenure?

A It would have been sometime past. No, I'm not aware of anything beforehand. I'm just know. I don't know if this was a first, but it was a departure from the previous couple of years.

Q And in the previous couple of years, the ads were a part of the newspaper itself printed on the newspaper; is that it?

A Yes.

Q Okay. Now, pursuant to certain production [2282] requests, there's a big box underneath that table which is supposed to contain an example of various promotional documents and scripts and ads that have been used over the last few years. Would you be surprised if I told you that this was the only



document I could find that used the name Red Jim nectarine?

A I'm non plussed. I don't know if I'd be surprised or not.

Q Okay.

A I can say, however, that this was the—this may have been the first time that this variety achieved the kind of volume that would place it in this grouping of varieties. See, these varieties, for both of these charts, were chosen strictly on the basis of volume. Consideration was given to the fact that not many growers grow the Red Jim variety. But basically when we looked at the varieties to be included here, we looked at a chart. We had it in the wall in our Reedley office. We just have a sign that says these are the top 15 varieties in order of volume.

You looked at the top 15 varieties, and that's basically what we incorporated into this chart.

Q Okay. So to get on this chart you've got to be one of the top 15 sellers?

A We make decisions when it comes to pieces like this, you know, what variety shall we include based on [2283] volume and common sense. Volume might tell us, you know, we might take volume at face value and just say let's print the top 15. Common sense would tell us, let's say we were only producing a 12 variety chart. We'd still want to include, for instance, a Kelsey plum because it's a green plum. We try to promote the concept of color mixes when retailers display plums. So Kelsey is a valuable item in the mix.

Q And that's why Kelsey is shown with a green stripe in the middle of Exhibit 256, to get the color mix, to let the buyer know that it's a plum of a peculiar color, a green color?

A Right. In plums we have more ability to differentiate specifically each variety by its color characteristics. In peaches and nectarines we didn't really have the—you know, you don't have the leeway to do that in those commodities. They don't have that kind of color spectrum, shall we say.

Q They just have a color spectrum, but it's less broad than the color spectrum, or the increments are closer?

A All the varieties are variegated, shall we say, but variegated pretty much the same. Oranges, yellows, you know, dark reds, light reds.

Q I see, for example, on Exhibit 256, Summer Grand is a little bit more yellowish than Flavor Top, and Fantasia is a little bit more reddish than Flavor Top again. So in [2284] color of darkest to lightest, just looking at the chart, I'd go Fantasia would be the reddish. Then next in order would be Flavor Top and next in order would be Summer Grand. Is that basically what you're trying to tell me?

A In fact, in the case of peaches, we discussed this specifically before we produced these. We couldn't come up with a very good rational way of presenting each variety as it normally appears with an appropriate color representation. So very simply, we took—we have a bar across the top of each commodity that goes clear across the page.

Q And that's with the name of the commodity right in that bar?

A Right. So that's a commodity, you know, representation bar, shall we say. And now, in the case of plums, we try to put a color to each of—you know, we call our plums reds, blacks or purples or greens. There the color differentiation is far more specific.

But with nectarines and peaches, we just said let's start with a color below the bar that contrasts somewhat with the bar, and then just take three representative colors of that commodity, and we'll just go one, two, three, one, two, three, and that's what you see happening here.

Q I see. So it isn't so much that you try to match [2285] the fruit. You just try to put the fruit in one of three different categories of colors?

A Right.

Q So I guess, in looking at the nectarine graph, for example—well, is the same true of plums, or did it work with the three colors with respect to just peaches and nectarines?

A Peaches and nectarines in particular. We almost—in some cases you almost want to de-emphasize the color differentiation in nectarines because we want to promote, let's say, yellow—varieties that tend toward yellow or tend toward less red tone; in the late season, because it's difficult to achieve color in the late season, but you can have spectacular flavor, and we tell retailers that too. You know, don't forsake these varieties just because they don't have eye appeal dazzle..

Q And how would this chart be telling the retailer which one? Give me the varieties that would fall under that category that would be in the yellower category that had good flavor, but not so much reddish

on the outside. Is that what you're talking about, having three colors in the category?

A The three colors were just chosen to represent the commodity.

Q Okay.

[2286]

A So on a nectarine you might find a dark red color, you might find an orange color or a lighter orange background color. And these bars don't necessarily—you can't expect them to correlate with the characteristics of the variety. Like I say, we just arbitrarily said since we really didn't feel we could achieve that kind of representative color assignment, we said—you know, because some varieties vary from year to year and from grower to grower.

Q Sure.

Q You might have the same variety that will tend more toward a paler look, and another grower might produce—given the season, you might have a variety that will come out more red in a particular weather pattern, or yellow.

These are just whole mass of color. It was just a symbolic representation of the commodity. You know, nectarines are kind of darker and redder than peaches, so that's why the peach color bars are just, you know, are more peach like. But there again, they just go, you know, medium, dark, light, medium, dark, light, and the same in nectarines. It's medium, light, dark, first. For what reason, I don't know.

It was an appealing balance, you might say. We tried to balance the tones out.



Q When you picked the medium, light, dark for the [2287] nectarine grouping, did you try to match varieties with medium, light, dark that in your mind fit?

A No. We didn't have a specific design in mind for matching colors to varieties. we just went one, two, three, one, two, three.

Q Medium, light, dark, medium, light, dark, irrespective of what variety name was listed?

A Right, because we just didn't feel like we could. I guess we weren't up to it, you know, putting down the specific bars. They aren't as clear in their applicability as these green colors, say, for instance, are clearly applicable to a Kelsey.

Q Okay. But see, I'm looking at a plum. I'm sorry. Strike that.

A A peach.

Q I'm looking at a peach, and it looks, unless my eyes are different than yours, it looks like I'm going the first bar for Elegant Lady is medium, and then Sparkle is dark and then O'Henry is light, and then it looks like California Red is medium and Fair Time is dark and Autumn Gem is light and Carnival is medium. Is that a fair representation of what you're intending there?

A We didn't intend for those mediums, darks and lights to be symbolic of the medium color, dark color or light color of any given variety. We just laid them out [2288] one, two, three in order so that we get a splash representation of the various colors that are representative of the commodity, not of any specific variety.

We only did that in plums where we felt that there was more of a clear relationship between a specific color and a specific variety.

Q Okay. I draw your attention to the nectarine section. Is the same true there? With Flavor Top it shows a medium, and then Summer Grand a light and Fantasia a dark, Royal Giant a medium and Flamekist a light and Red Jim a dark, and Fairlane a medium. Again, you weren't trying to match a medium, light or dark to a variety name. It's just the luck of the draw as to what name came to what color; is that what you're saying?

A That's all. We started with a bar below the commodity bar that was different from the commodity bar color, and we just went from there and tried to make it look like a balanced, total impression.

Q Okay. Now, you're saying this one is what you called your mid to late season free standing insert. So 256 is the mid to late season free standing insert. I'd like to mark another one which I understand is your early season free standing insert. Your Honor—

JUDGE BAKER: 298.

BY MR. CAMPAGNE:

[2289]

Q The next in order, Mr. Parker, is Exhibit 298, and I'll represent to you that this is out of that box I was referring to you that Mr. Cooper produced for me of a representative sample of all the various advertising that's gone on for the last few years.



Let's look at Exhibit 298. Is this, in fact, the early season for 1989 insert you were referring to? That is the one that came out before Exhibit 256?

(The document referred to was marked as Exhibit 298 for identification.)

A Yes. It says at the top early mid season varieties, and it says May, June, July.

Q Okay.

A Whereas this other says mid late season, and it's July through October.

Q Now, what I'd like to do is have you—I want to ask you some questions about comparing the two documents, and that is I'd like you to compare Exhibit 298, the early to mid season one, the first one that went out, and I'd like you to compare it against Exhibit 256, which is the mid to late season one that came out.

Now, the first thing I wanted to point out to you and ask you for some explanation is that I'm looking at the early to mid season exhibit, which is 298. It lists Flavor [2290] Tops. So does the mid to late season one, correct?

A Correct.

Q Flavor Top is on both.

A Uh-huh.

Q The early to mid season one, 298, lists Summer Grand, and Summer Grand is also listed on the mid to late season one. It's on both, 256 and 298, correct?

A That's correct.

Q And Fantasia is on both, isn't that correct?

A True.

Q So we've got Flavor Top on both, Summer Grand on both, Fantasia on both. Do you see any others that are listed on both in the nectarine categories?

A No. I don't yet.

Q Now, looking at the color bars on the nectarines on the early to mid season one, that is Exhibit 298, they seem to me to follow a different pattern. In other words, the color bars there seem to me to try to be matched to the color groupings of the actual fruits.

A It was a spectacular coincidence if they did, because they go in order, one, two, three, one, two, three. There are nine of them under the nectarines, and they just go through three different—there are three different shades of red, if you will. I don't know if you'd call that red exactly.

[2291]

Q Okay. What would you refer to the shade for Maybelle as being on Exhibit 298?

A I don't really have a word for it. Let's say magenta, how's that?

Q Now the word for the color, but I mean you using the phrase here medium, light and dark when we were referring to 256. For 298, I guess you're saying they fall into medium, light and dark also?

A Either medium, light, dark, or light, medium, dark.

Q So it's got—as I understand it, 298 has got—Exhibit 298, the early to mid season chart has got four groupings of color?

A No. That's not what I said, I don't believe.

Q Okay. Repeat it then correctly.

A It's the same sequential—and I might add arbitrary sequence of one red shade, two red shade, three red shade, and then we go back to one, two and three, and one, two and three again. So out of nine varieties—

Q So it goes light, medium, dark, light, medium, dark of the nine varieties shown?

A Right, if indeed this is light and this is medium. I'm not sure, you know, looking at these shades of red. The first one might be medium and the second one might be dark.

Q And the third one dark?  
[2292]

A The third one is definitely dark to my eye. But in essence, it's just a mix of colors that is symbolic and representative of the commodity, not of the specific varieties. If it were, then we would have gone to the same dark or the same medium on the cross over varieties.

Since we have an early mid chart and a mid late chart, in that mid area there are some repeaters. If we had intended to specifically represent individual varieties with a dark or a light, then we would have maintained the—you know, that light bar or that dark bar for the varieties that cross over, but I don't think that is the case.

Q If it were, it would be a coincidence, because that wasn't the intent?

A That wasn't the intent.

Q I see. Except with respect to plums?

A To plums, and I might add Bartlett pears. With Bartlett pears we had a yellow and a red, so that was pretty—you know, just for the sake of breaking up the monotony, if you will. We finished up with red Bartletts, which are really quite a minority, but in Bartletts you don't have too many varieties to represent, so we tried to give them a hit there at the end of that late chart.

Q Now, I can't remember the number. Did you say it had to be in the top producing number of variety of nectarines to get listed on Exhibit 256? In other words, [2293] one, two, three, four, five, six, seven. There's seven varieties of nectarines listed on 256, and there's one, two, three, four, five, six, seven, eight, nine varieties of nectarines listed on Exhibit 298. On 298 are those the nine highest producing volumes, and on Exhibit 256 those are the seven largest producing varieties for those times of years?

A I wouldn't say yes in the way that you asked the question.

Q How did you select what varieties to list on Exhibit 256 for nectarines and what varieties to list on Exhibit 298 for nectarines?

A We basically looked at a listing of the top 15, give them the numbers that we had available to us at the time, and, you know, as I say it was a mixture of volume and common sense. If Kelsey had been out of the running on the top 15 we probably would have



included it anyway, just because that color mix is an important thing to promote in the plum deal. It was basically volume.

Q Is it fair to note that there are green plums for sale?

A That there is a great variety of distinct colors within the plum commodity.

Q Okay. Is it pretty fair to say that there's a bit of arbitrariness or guess work, or just a glycan, so to speak, as to what varieties are chosen then?

[2294]

A Well, as I said, we start with volume considerations. I don't know if you've compared these to a list of top 15 varieties.

Q That's what I'm asking. Is that what governed you, pure volume?

A That was our basic consideration when we started putting these together.

Q Now, is it fair to say that in looking through the box of all the promotional brochures and fliers and advertisements in trade journals and magazines and that type of thing and these insert type things and brochures, I'm given a strong impression that the larger varieties are almost exclusively what's promoted. Is that a fair understanding?

A Well, I suppose that's where one would start, since when you want to be specific about varieties. We have a lot of varieties that's non-variety specific where we just talk about plums or nectarines or late season nectarines or whatever. We're not always variety specific but, you know, if you look at the top 15 varieties, you have an overwhelming percentage of

the volume included there, so we're serving as many people as possible, as many growers as possible.

Q It looks to me that most of the advertising dollars were going toward the top 15 varieties of peaches, [2295] plums and nectarines. Is that a pretty fair statement? I'm not talking about California Fruit.

A The dollars are going toward all varieties. As in the case of say these bar charts on these two season calendars, part of the motive here in presenting these varieties is just to show that there's a progression. We have complete coverage.

When we start in the early season, we start in mid May with significant volume, with enough volume to make for a continual supply, and we can go clear into the middle of October and even beyond. Well, in the case of Bartletts, but at least into mid October. So we're trying to show not so much specific variety as much as the continuity that we - the California Summer Fruit Industry can supply the retailers needs for the entire glorious summer season.

Q Okay. But, for example, I used to raise Red June nectarines and May Grand nectarines. And in 298 you don't mention Red Junes. You only mention May Grand. What happened to the Red Junes?

A How many Red Junes were produced at the time we put out these charts?

Q I don't know. I'd have to look it up in your brochures. But they come out at the same time as May Grands. There's an overlap. You're saying that would have been a volume determination?

[2296]



A In placing varieties on this chart, yes. But if a retailer merely knows that nectarines are available at this time, when he talks to a sales desk he's going to find out probably from the same person that handles May Grands that Red Junes are available too, so the stimulation is there.

Q But won't you admit I that if he's got a chart on his bulletin board sitting right in front of his face while he's making a phone call that's got the name May Grand on it, he's more likely to order May Grand than he is to order Red Junes if he's not familiar with the name Red June.

MR. COOPER: Objection, Your Honor. I think Mr. Campagne's mischaracterizing the chart there as to when May Grands and Red Jims come into production. I think they're showing different time periods on those charts.

MR. CAMPAGNE: Red Jim is not shown at all.

MR. COOPER: On the second chart it is for a certain time period.

MR. CAMPAGNE: No. Red Jim is shown, not Red June.

MR. COOPER: Did you say Red Jim?

MR. CAMPAGNE: Red June, J-u-n-e.

MR. COOPER: Oh, I'm sorry. Excuse me. I misunderstood what you said.

BY MR. CAMPAGNE:

Q Do you remember the question?

\* \* \* \* \*

[2361]

explanation, Mr. Campagne. In view of that, Mr. Cooper, I think your objection has been met.

BY MR. CAMPAGNE:

Q I'm not holding you to the exact figures, but can you kind of draw the pie chart for us?

A Sure. Mr. Cooper saved me the trouble. I was going to refer to that too, because I recall Mr. Peterson describing each of the general line items on that budget. But just in the most basic terms, you could say that about half of last year's budget, that is the 1989 budget.

Q So about half of the approximate five million budget you're saying?

A Yes.

Q So 2.5?

A Was spent on media advertising. About 25 percent, or half of the remaining amount was spent—

Q One-fourth, in other words?

A About one-fourth of the total was spent on merchandising activities, and the remainder was spent on all other activities, including consumer education, publicity, food service and assorted other activities.

Q And when you say half went to media advertising of the five million bucks, that's T.V. and radio, correct?

A Correct. T.V. and radio and production, or there's another term for paying talent costs. That's

[2362] considered a separate cost from the direct buy of time.

Q It goes into the creation of the advertisement, in other words. Hiring the actor, making the film and playing the film on air is what you call media advertisement?

A Even in a year when no new ad is created you may have to pay residuals is the term I was searching for.

Q Yes. AFTRA union does require residuals. Okay. And regarding the fourth that goes for merchandising, what do you mean by the term merchandising? Is that your bailiwick where you're working directly with the retailers or the wholesalers?

A Yes.

Q And what falls into that broad word of merchandising?

A In general, we can start with an attempt to communicate directly with retailers, and then we can talk about an endeavor to work through retailers to communicate with consumers. So, a large area of activity there is hiring of the field staff. Many major commodity groups do the same thing. It's common practice to field a staff of representatives in territories that are districted by according to population or according to store representation. And of course, store representation just arises for population.

Q Now, when you send your field people out to the [2363] retailers, what kind of instruction do you give them? What are their duties?

A well, their duties are several. First of all, to—perhaps most important is to try to stimulate interest in building displays of California Summer Fruits and advertising California Summer Fruits more frequently and better.

Q Who owns those displays if and when they're built?

A All the displays are done within the produce department. So the retailers own the displays. We try to encourage them through building excitement and through offering incentives. We try to encourage them to do more than they already would. They're already going to display pretty well, because they see California Summer Fruits as their probably number one profit opportunity in the summer months.

Q You're just trying to get them to do more than they would do otherwise?

A Correct, or more than they would for, say, a display of Jersey or Georgia peaches.

Q And that's by giving them little incentives to if they sell so many California peaches as opposed to a Georgia peach, then they might win a radio or they might get a little gift on your promotion program?

A Well, not specifically in that way. That's not [2364] one of the ways in which we offer incentives, but we may offer incentives, for instance, if they produce—in the past if they had produced proof of advertising, then we would score the ads that they had presented to us according to a fixed system of incentive.

So, they would tend to advertise more, and by virtue of—if there's a feature ad in the newspaper, it follows



that there might be a feature display in the store at the same time.

Q Is it fair to say that that's—when Mr. Peterson was talking about the green stamp program where you give points to the retailer for putting in his ads, California Fruits are here in my store. Your goal in essence, I guess, is to try to get the retailer to push the California plums and peaches and nectarines more than the other states peaches, plums and nectarines, correct?

A That's correct, although we don't—we put it in a positive framework.

Q I don't understand.

A Well, in other words, we don't understand promote our product at the expense of some other product. We always talk about our product by itself.

Q So let's say if I owned a grocery store in New York, I could run two ads side by side that said dear ladies and gentlemen, I've got great California peaches for sale. [2365] Come in and buy them, and then right next to it I could have an ad that said I've got great Georgia peaches for sale, come in and buy them. And if I showed you proof of ad, I would still qualify for your no contest contest point system to win a trip somewhere, win a television or a radio or something like that?

A If the California ad were specifically designed California fresh whatever, fresh peaches, nectarines or plums, absolutely.

Q Even though side by side I was running a Georgia peach ad?

A That's a free market, and that's good competition. I mentioned retailers who would display both at the same time, and that's healthy. That's fine. We just would like to see them promote California. A retailer can't very well advertise California peaches if he doesn't have them on display. That's the separator. That's the fall out.

Q Okay. Is that primarily what your field representatives that you supervise do?

A well, that's one of the things. More fundamental even than that is to establish a relationship of trust for each field person to establish a relationship of trust so that the retailer looks to that representative as being a source of good, sound information about what's happening with the crop, what varieties are available in total, all [2366] 500 of them.

Q You mean like if I was a grocery store owner and I just wanted to know next week what the plums are going to look like from California, I would trust my field representative to be truthful, to say it's a good crop or it's kind of a poor crop, or it's tasty, it's not so tasty, that type of thing?

A Any general information. If the variety hasn't arrived, perhaps the field rep can't say how tasty it is. But we try to give them information even in advance of when they might see the fruit itself.

For instance, every Friday for the last couple of seasons we have informed the field representatives via a FAX transmittal each Friday. I said Friday already, but we give them a forecast for—a forecast to inform them of which varieties are going to be in the process of harvest and shipment the following week, and we also refresh their memories by giving them



varietal characteristics and any varietal idiosyncracies that might be attributable to this particular season, whether conditions, timing, harvest interruptions, so that they can be informed when they go to a retailer on the Wednesday of the following week. They can kind of—they can just about know on Wednesday of the following week after they receive that FAX what's happening on that day without having to call in to find out.

[2367]

Q Let me see if I'm understanding this correctly. So that approximately the Friday before Mr. Elliott picks his Tom Grand nectarines, there is a FAX sent out that Tom Grand nectarines are coming?

A In general terms, yes, that's true.

Q On all varieties, or just the major varieties?

A No. The FAX is a one pager, and it highlights the varieties that are of the most interest during that particular period.

Q And does that mean, by most interest you mean varieties that have a larger volume than other varieties?

A Sometimes it may be volume, other times—well, we start by looking at volume within that given period.

Q Well, you wouldn't include Tom Grand nectarines when Mr. Elliott is the only grower of Tom Grand nectarines of any size in the state, would you?

A We may include—now, as I recall, Tom Grand is an example of a yell-ower type variety, or a less red variety, shall we say?

Q Yes.

A We will at times make an effort to point out that these less red varieties are available. So I don't recall specifically if we included Tom Grand, but we may in one of those Friday transmittals.

Q You said that Friday transmittal also has kind of [2368] a general statement as to the characteristics of that fruit. Is that like taste or—

A Taste, color, size, all the characteristics of the fruit, whether it's a new—sometimes we'll put in a new variety. For instance, a Catalina plum hasn't achieved the status of being in the top 15 varieties, but I'm positive that we mentioned the Catalina either in '88 or '89 simply because it fills a gap of black plums. People seem to like black plums and it makes for a good color mix with the reds and the greens and so forth. So Catalina was specifically mentioned as bridging a gap between two other black skin varieties, and also having great flavor.

Q I see.

A So, these are just—

Q Who makes those decisions? For example, the decision to put the Catalina on the Friday FAX machine? Is that you or someone who works for you who makes those decisions?

The field staff in Reedley generates the information.

Q Mr. Van Sickle's office?

A Mr. Van Sickle's office. You know, I could have some input there too. In fact, if I were to eat a Catalina and say wow, this tastes great. Let's highlight this, or if there's some other thing that's unusual or noteworthy about [2369] it. What we're trying to do is provide a currency, a parlance for the field staffers so that when they walk in to a man's office, they can say yeah, I'm aware of what's happening today. This is it.

In the meantime, pre-season, we prepare the field staff by going over the entire pre-season estimate of varieties.

Q Volume and that type of thing?

A The pre-season estimates, yes.

Q By estimate, you mean estimate of volume or estimate of prices?

A No, estimate of volume.

Q I see.

A Far be it from us to estimate price.

Q Okay.

A We'd always try to estimate on the high side, I would think. But we don't get into that. just talk about how any packages are anticipated for the season.

Q Why do you care about that? To me it would seem like you would end up lowering prices by telling buyers that there's a big crop out there. Why is it in your bailiwick to tell buyers what the volume is of a particular variety? Why do you care to express that to a buyer?

A It's a point of information so that they know what's available to them.

[2370]

Q But why tell him whether it's a medium size crop or a big size crop? Why does he need to know that?

A Retailers may not even be willing to get involved in advertising a commodity unless they know that there's a sufficient and consistent continual supply so that they can do repeat business. It's important in retailer's minds to—it's important to retailers that they have a sufficient supply to feature the product.

Q Say like peaches. You can pick up a report and read that there's 14 million packages on the tree before the season starts. What does a retailer really care how many packages per variety are coming on? He knows he's going to have peaches all summer long, doesn't he? If he doesn't get them from California, he's going to get them from somewhere else. He knows that California has got 14 million hanging on the tree at the commencement of the season, so why is it important for your field people to tell him how many packages per variety?

A So that he can see the whole season supply laid out before him. If one variety a fickle bearer perhaps, or if one—there may be a gap in varieties. If there were a gap, and I'm not aware of this situation occurring necessarily, but let's suppose that we have a two week gap in our peach supply, we wouldn't want to lose the retailer's interest. We'd want to say we'll make you aware that this [2371] gap is here, but we'll



make every effort to maintain his interest when the production comes back in.

Now, that's a purely hypothetical situation. I don't know if it's occurred.

Q What was the name of the new plum you were telling us about just a second ago?

A Catalina.

Q Catalina. So when you announce like a new variety like that, you would then give an estimate of how many lugs of Catalina are going to be available the following week?

A When we FAX this information to the field staffers, we include the pre-season estimate in terms of millions of packages or thousand, I forget how we put it, and we also would show a—for the whole commodity, number of packages packed to date so they can see where we are in the progress of the harvest.

Q I see. Now, what if I'm producing the variety of, I don't know, let's say I have a variety of plums that competes with the Catalina. Do you think it's fair that you're not mentioning my variety of plums?

A Well, there are many varieties that wouldn't be mentioned in one of these weekly reports. We try to first address volume, as I talked about in relation to the early and mid late season variety charts, and stimulate interest. By stimulating interest, we're drawing attention to all of [2372] the varieties that are available.

Q But what do you say to the grower who says you drew more attention to the one variety than you did my variety. I wish you would have mentioned my new patented variety or my new—or my old variety of

plum rather than the Catalina. I mean, how do you deal with that problem?

A I'd have to talk to the grower. He may be marketing through someone who has Catalinas and the fellow who gets the call about the Catalina variety specifically will say you need some red plums to go along with that black one, if it's a red plum that he has.

If it's—if he's growing another black variety and it's a good, sound variety, other growers will notice and before long we'll see a growing trend, as we saw in the Catalina. The Catalina is on the rise.

Q More growers planting more trees of Catalina?

A Yes. More trees are being planted, the volume is going up, because the growers recognize it's a good variety.

Q But hypothetically, if I invented the Catalina and I just wanted to keep it for myself and not let my neighbors grow it, then you wouldn't mention it to anybody, would you?

A well, it depends. If there's something remarkable to tell the field staff about, that they might wish to talk to retailers about, they can talk about any other varieties that they wish. And we may tell them about a proprietary [237.3] variety, for instance, the Tom Grand. We may tell them that that's available.

That may be the biggest volume item during that period. As a rule, now some big grower may come along and prove something to the contrary, but it's unusual when a single individual has the wherewithal



in terms of harvest logistics and packing capacity to achieve the kind of volume with his own proprietary variety to, you know, rise into the major variety kind of category. There are a couple of exceptions.

Maybelle nectarines, for instance, which I think appear on—well, maybe they didn't.

Q Is that a proprietary variety of nectarines?

A Yeah.

Q Fowler Packing owns it? That's the Parnagian family?

A It is on this chart here. Maybelle nectarines.

Q Is that the Parnagian family?

A Yes, I believe so. Maybelle nectarine appears on this chart, but that variety, you know, it's immaterial to me who owns it or who packs it and ships it. But it so happened that an individual had the capacity in his facilities to achieve the volume with that variety that put it just barely, but put it on the list of the top 15 within that commodity.

[2374]

Q But why should someone's assessments—

MR. COOPER: Your Honor, before we go on, could we just indicate for the record what exhibit you are talking to there? You didn't say which exhibit.

THE WITNESS: Oh. It's Exhibit No. 298.

MR. COOPER: Thank you. I'm sorry, Tom.

BY MR. CAMPAGNE:

Q But you've never put minor varieties on exhibits such as that, have you? You've got to have significant volume?

A Yes. When we're representing the whole of the season we're looking for significant volume, correct.

Q So if I'm a grower and all I grow are varieties that are in small production rather than large production, in essence my advertising assessment is going to promote on those types of exhibits varieties other than what I'm growing, correct?

A Well, we've only been talking—we focused on our attentions on these kinds of charts, and we've been talking about specifics, but there are many other kinds of promotion that we don't that don't address varieties whatsoever.

Q Right. Like the things we marked there, the television ads that say eat California plums or eat California nectarines?

A Right. And as I mentioned in our communication to [2375] the retailers we do mention other varieties. But for choices, for instance, for these bar charts you have to have some consistent criteria. We start with volume and then use common sense to supplement it.

Q Who approves these bar chart exhibits that you've got in front of you, the early to mid and mid to late exhibits? Who signs off before they go to the printer? Is that you or Mr. Field or someone else?

A No. I signed off on these. We make it a staff—you know, I check with other people on staff

and try to get a reasonable—we try to develop a rationale from what we do, but I signed off on this.

Q Okay. I know that Mr. Cooper is preparing some exhibits that will get more to the penny and more to the actual week of how this money is spent, but can you take Her Honor through on the one half that's spent for media advertisement, the one-fourth of the five million is spent for merchandising, and the one-fourth that's spent for all other things, such as consumer education publicity, food service and assorted other items. Can you, for those three categorical areas, you know, the one-half—let's start with the one-half for media advertising.

Can you basically cash flow that for us through the months of how that money is spent?

A Well, I'd rather say that Mr. Field—I know that [2376] over the weekend Mr. Field prepared a chart like that as you requested, and I would be speculating at some point if I were to define a cash flow for you in the media side of things, because I don't look at those billings.

Q I see. You just have a general understanding that it more or less follows the crop?

A I have a general understanding that there is usually a significant pre-season commitment to buy media time or to pay for media time. You get to a point where you have to pay for time.

Q Even before the harvest?

A Even before the harvest, so there is some commitment there, but I am not—you know, I would be speculating if I were to define exactly how much

that was. That's been changing over the past few years also as our media.

Q They require their money up front earlier, I take it, as television time becomes more significant?

A I'm not certain that's the case, but I just know that there are some changes taking place in the way those buys were affected. Mr. Fields', chart may show you how that's happening.

MR. CAMPAGNE: Do you have those for us, Greg?

MR. COOPER: We don't have them for you today. We'll have them for you first thing tomorrow. Mr. Field

\* \* \* \* \*

[2388]

A Well, there is a slice of the budget that is devoted to expert activities, merchandising activities primarily. For instance, in Pacific rim countries. I can't grab a number off the top of my head, but I'm sure it appears in those budgets.

Q You mean promote in Japan, eat California fruit?

A Japan has been a minor factor because of trade barriers and so forth, but Taiwan, Singapore, Hong Kong have been areas of export activity with some positive results in terms of level of shipment.

Q Do you personally believe that the import of Chilean fruit hurts or helps California fruit sales?

A I don't know if I have the wherewithal to make statement like that.



Q Just your personal belief?

A Since the seasons oppose each other and they don't overlap. If they were to overlap I might have a comment. But with no overlap, it neither hurts nor helps.

Q Okay. Now, Your Honor, might the witness be shown Exhibit 239?

JUDGE BAKER: Yes.

BY MR. CAMPAGNE:

Q I'll just show it to you here. Here I want to ask a couple of questions. You talked about these tours, you take retailers on tours in the production areas to help [2389] educate them. Here's one that occurred—was given to me as a sample by Mr. Cooper of a Lucky tour that occurred on June 1st and—I'm sorry.

A June 21st.

Q June 21st and June 22nd of 1989.

MR. COOPER: What number is that?

MR. CAMPAGNE: The exhibit number is Exhibit 239.

BY MR. CAMPAGNE:

Q Now, what I'm interested in knowing here—

MR. COOPER: I think for the record, you indicated this was given to you as a sample. This is the one you specifically requested.

BY MR. CAMPAGNE:

Q This was produced from Mr. Cooper pursuant to our request for production. It's kind of like a

general outline agenda, and then a more specific agenda.

Are these the type of tours that you're talking about where you try to get a chain to get more and more interest in California, so you give people a tour?

A This is the type of tour that I referred to, yes.

Q On this one, for example, who went on it? These are Lucky representatives or Lucky buyers?

A In this instance.

Q I take it Lucky is a grocery store of some sort?

A Yes. Lucky is a chain store with divisions in [2390] various parts of the country.

Q And so on this one, for example, who did you take on your tour?

A I took Mr. Ed Odron, who is the vice president in charge of produce for Lucky stores, and he is in charge of the northern division.

Q That would be a northern group of states?

A No. This is northern California.

Q Lucky is a California store, or is it in other states as well?

A It's associated with stores in other states. I couldn't say if it's strictly California or not.

Q It's kind of a small regional chain then?

A In terms of this tour. The people involved in this tour were California merchandisers.

Q Okay. So in other words, they would be buyers of fruit to be sold in California?



A Yes, in this instance.

Q Okay. And did this gentleman bring associates of his with him?

A He, as I recall, has—he supervises seven merchandising supervisors who in turn each have responsibility for 25 to 30 stores.

Q I see. So did he bring those seven gentlemen with him also then?

[2391]

A He brought six. One was unable to make it at the last minute.

Q So it would be he and six others, so there was approximately seven Lucky buyers?

A No, they're not buyers. The buyer was unable to come on this tour.

Q What are they if they don't buy plums and nectarines?

A Well, merchandisers aren't direct buyers of the fruit.

Q You've lost me. Can you explain that difference?

A Sure. The buyer, whose last name I'll probably mangle if I try to repeat it, but his first name is Roy. The buyer is the fellow who is based on their East Bay office who actually is on the phone buying the quantity of fruit that Lucky requires for a given period of time.

Q But in East Bay you mean the Oakland area of California?

A Yes. I think it's Danville.

Q Okay. It's a little east of Oakland?

A Yes.

Q Okay. He buys the fruit, and these people are supposed to sell it for him?

A They merchandise it.

Q Sell it, display it, sell it?

[2392]

A Move it.

Q Move it.

A Somehow move it.

Q He buys it and they move it for him?

A They move it, and they move it by—

Q And hopefully they talk to each other.

A They certainly talk to Mr. Odron, and I'm sure there's some intercommunication among them.

Q So these are the merchandisers, not the buyers you had on tour?

A That's correct.

Q Okay. Now, was there a strategy there as to why you chose to take merchandisers rather than buyers?

A Well, we're, as I said much earlier, our field of endeavor has to do with the merchandisers in the stores. Now, we may find we are talking to buyers from time to time, especially in a smaller chain, when the buyer is actually the fellow who sets the ads. But usually a merchandiser will set the ads.

Or you might have a separate fellow in charge of advertising.

Q I see.

A But our job is to, in general, I would say is to communicate with merchandisers, because they build the displays. They groom the appearance of the produce [2393] department, and they're actually, when you get down to the next level in the store, they're actually the people communicating in the store. There is the ultimate hit. That's what we're after.

Q So you took these merchandisers on this tour?

A Yes.

MR. CAMPAGNE: Can we go off for a second?

(A discussion was had off the record.)

JUDGE BAKER: We shall recess for one hour until 2:00 then.

(Whereupon, at 12:58 p.m., the hearing was recessed, to reconvene at 2:00 the same day, Monday, February 5, 1990.)

[2394] AFTERNOON SESSION

2:01 p.m.

JUDGE BAKER: On the record. Mr. Parker is still on the stand.

BY MR. CAMPAGNE:

Q Just a few quick questions, Mr. Parker. A few quick questions with respect to this exhibit that we were using as example, the tour Exhibit No. 239.

On this particular one, who made out the schedule as to what packing houses are visited? Would that be you, or would that have been Mr. Van Sickle?

A There was a joint effort. We passed information back and forth and developed it, shall we say?

Q Okay. So the tour of the Lucky people started off at Wawona. That's Mr. Al Peterson's company, correct?

A It's not his company, but he works there.

Q He works there. And then it went into LTD Packing and Orchard facility. That's a Reedley packing house, correct?

A LTD is an organization of ranch packers. Ranch packers deliver to a central cold storage. They're standard all over.

Q For a Reedley broker named Mr. Jost?

A Jost—

Q Mr. Don Jost?

[2395]

A Yes, and it's a Guimmara company.

Q And Guimmara sells the fruit for the LTD label people?

A I think that's how it's set up, yes.

Q Okay. And then the next one they went to is George Brothers. Mickey George is chairman of the nectarine committee I understand, is that true?

A Correct.

Q And the next one they went to is Mineral King. Do you know who owns Mineral King?

A I'm not sure if he's an owner, but the fellow in charge that I know is Jim Wanzer.

A Whose on the committee?

A He may be an alternate on the plum committee. I don't recall exactly.

Q Okay. And apparently there was a meal at the—there was an evening dinner and reception and whatnot at the hotel, and then he next day—

A I don't see a reception there, but we had dinner at the Holiday Inn, yeah.

Q Well, apparently there was a cocktail hour and then a dinner, and then just lodging at the hotel?

A Well, in conjunction with dinner there was a cocktail hour.

Q Okay.

[2396]

A We didn't exactly have a reception, but it was kind of a place a little more formal. It doesn't matter.

Q Okay. Then the next morning they went somewhere called the Kingsburg Apple Packers. What's that?

A Well, if I may, all of these stops that we made on the tour were at Mr. Odron's request, some more specifically than others.

For instance, he asked—do you want me to get into a general explanation of how we chose these spots here, or should I just talk about this one?

Q I was just trying to figure out who Kingsburg Apple Packers is. I just never heard of it before.

A Sure. It's a big concern that packs Asian pears, and Granny Smith and I believe some other varieties of apples. Fujis, for instance, Galas. I can't name their whole variety list. I know they're involved

with some Granny Smiths and several varieties of Asian pears.

Q And are these pears that are under the pear zone order or under the federal order?

A It just so happened, the front that they handled wasn't covered under any of the orders.

Q I see. And then the next one they went to was Ito Packing, and I take it he's on one of the commodity committees also. That's the Red Jim Mr. Ito that we've been talking about?

[2397]

A He might be involved in a couple of them.

Q Okay. And then the next one they went to is Royal Valley, and I take it that's the company that in the minutes Mr. Wyckoff was formerly associated with before his death?

A I happen to know that he was associated with them, yes. I don't know if he was ever on a committee.

Q Okay. And then the next one they went to was Ballantine Produce. That's Mr. Virgil Rasmussen's company, correct?

A Correct.

Q And then Metzler and Sons, is that a packing facility near the Modesto Airport where they left from?

A Well, it's on the way home, as a matter of fact.

Q Or on the way back?

A Right.

Q Okay.



MR. CAMPAGNE: No further questions,  
Your Honor.

JUDGE BAKER: Very well. Thank you.  
Mr. Cooper?

MR. COOPER: Yes.

MR. CAMPAGNE: Excuse me. I would just  
move 239 into evidence Your Honor is all.

JUDGE BAKER: Is there any objection?

MR. COOPER: No, Your Honor.

JUDGE BAKER: 239 is hereby admitted  
and received into evidence.

\* \* \* \* \*

UNITED STATES OF AMERICA  
DEPARTMENT OF AGRICULTURE

AMA No. 51  
F & V 916-3  
F & V 917-4

WILEMAN BROS & ELLIOTT, INC., A CALIFORNIA  
CORPORATION, AND KASH, INC., A CALIFORNIA  
CORPORATION, PETITIONER

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,  
RESPONDENT

[Excerpts from Testimony of Karen Tully]

Room 2002  
Federal Building  
1130 O Street  
Fresno, California  
Monday,  
February 5, 1990

The parties met, pursuant to the notice of the  
Judge, at 9:05 a.m.

Before: HON. DOROTHY BAKER  
Administrative Law Judge

**APPEARANCES:****For The Petitioner:**

THOMAS E. CAMPAGNE, ESQ.  
 CLIFFORD C. KEMPER, ESQ.  
 5108 E. Clinton Way, Suite 122  
 Fresno, California 93727

Heritage Reporting Corporation  
 (202) 628-4888

[2529]

A Exactly, Mr. Ito was sitting to my right at this meeting. We had a huge block table. It was a hollow square was the way it was set up, and there were probably—you've got the minutes here, so it shows everybody that was there. I would say 25 to 30 people were there. Mr. Ito was sitting to my right.

When he looked at the flight and saw that there was not going to be any media advertising during the time his Red Jims were coming off, got a little upset.

Q How did you know that? How did you know he got a little upset?

A He started yelling. He said—I honestly thought he was going to take his shoe off and bang it on the table, he was so upset. I was sitting right next to him, and he said that if they don't advertise, change the flight and advertise during the time his Red Jims are coming off, he refuses to pay his advertising assessments.

People tried to reason with him and explain to him that he as getting more bang for his money at the beginning, that it would carry through, and just because they were taking a week off during the time his nectarines were coming out didn't mean that people weren't going to remember the Red Jim nectarine, and he would not be pacified. He insisted he would not pay his—only the promotion assessment part of it. He didn't refuse to pay [2530] the inspection. Just the promotion part of it.

Q I see.

A And just for the Red Jims, not for any of his other varieties. I don't want it to sound like Mr. Gianini's letter, because Mr. Ito did not say everything.

Q I see.

A He just said promotion assessment for the Red Jims.

Q I see.

A They then had some discussion quickly with the ad agency and changed the flight to accommodate Mr. Ito's Red Jim so that there would be television advertising during the Red Jim harvest.

Q Okay. I'd like to change the subject just a little bit, Mrs. Tully, with respect to the Lucky tour?

A Okay.

Q Did you have any conversations with anybody, Wileman Brothers and Elliott and/or Kash, Inc., one of the companies to be visited?

A On June 16, 1989 I asked Dale Janzen, who worked hand in hand with Mr. Parker in setting up the tour and who they would visit, and I asked him why Wileman Brothers and Elliott and Kash, Inc. weren't on the tour since they were customers. And I said something to the effect of it doesn't seem quite fair to take them around to eight select packing [2531] houses when probably everybody in the valley sells to Lucky at one time or another, and this doesn't look too good.

Q Did you also bring out the fact that their packing houses are located very close to some of the packing houses that were shown?

A I don't know if I talked logistics or not, because that's common knowledge with us. We know where everyone was.

Q I see.

A But Dale got a little upset, and told me that he wouldn't take anybody to see Tokkie Elliott, because Tokkie Elliott doesn't like us, and he doesn't know what Tokkie would say to people, so he wouldn't take anybody to see him. That was the end of the conversation.

Q I'd like to change the subject again and show you Exhibit 238 with regarding the charter flight to Mr. Sanderson's funeral. I understand that you're familiar with this, because some of your handwriting is on these documents?

A Yes, it is.

Q Does this exhibit indicate to you who paid for the charter flight?

A Well, it's a copy of a California Tree Fruit agreement check. It's not the cancelled check. Their checks are carboned, NCR carbon.

\* \* \* \* \*



UNITED STATES DEPARTMENT OF  
AGRICULTURE

Case No. F&V 916-3

AMA: F&V 917-4

IN THE MATTER OF: WILEMAN BROTHERS & ELLIOTT,  
INC., A CALIFORNIA CORPORATION, AND KASH, INC.,  
A CALIFORNIA CORPORATIONS, PETITIONER

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,  
RESPONDENT

[Excerpts from Testimony of Rodney Chang]

Room 2002  
1130 "O" Street Federal Bldg.  
Fresno, California  
Wednesday,  
February 7, 1990

The hearing in the above-entitled matter commenced, pursuant to notice, at 9:01 a.m.

Before: HON. DOROTHY BAKER  
Administrative Law Judge

APPEARANCES:

On behalf of the Petitioners:

THOMAS E. CAMPAGNE, ESQ.  
5108 E. Clinton Way, Suite 122  
Fresno, California 93727

On behalf of the Respondent:

GREGORY COOPER, ESQ.  
U.S. Department of Agriculture  
Office of General Counsel  
Washington, D.C.

Heritage Reporting Corporation  
(202) 628-4888

[2912] and I have go [sic] two sets of stickers here that I would like to mark, Your Honor, as Exhibits 316 and 317. I am marking the little stickers Alshir Red Kash, Inc. stickers as 316. And I am marking the stickers for the Sweetheart Kash, Inc. situation as Exhibits 317.

(The documents referred to were marked for identification as Petitioner's Exhibits 316 and 317.)

MR. COOPER: Excuse me, Your Honor. What is 315?

JUDGE BAKER: The brown folder.

MR. CAMPAGNE: 315 is these brown folders which I have not started examining yet.

MR. COOPER: Oh, okay fine. And the little stickers are 6 or 7?

MR. CAMPAGNE: 316 is the Alshir Red Kash, Inc. sticker. And 317 is the Sweetheart Kash, Inc.

MR. COOPER: Okay.

BY MR. CAMPAGNE

Q I would like to show these to the Judge and yourself. Are those the stickers you are referring to, Mr. Chang?

A Yes it is.

JUDGE BAKER: Do you put those on the fruit?

THE WITNESS: Well actually we don't really put [2913] them on the fruit. What we do is—that's the reason we have them in these little packets and there are 36 and we put the packet in the box and they do it at the store level.

JUDGE BAKER: Oh, the store then puts these on?

THE WITNESS: Yes.

JUDGE BAKER: Okay.

BY MR. CAMPAGNE

Q So you do it a little different than Mr. Gerawan whose own plant puts it on, I think he said, every fourth piece or every third of [sic] fifth piece, whatever he testified?

A Yes. We can't af—we don't have enough budget money for the machinery. It would take an awful lot of people.

Q Okay. And so you have worked out some arrangement with your stores for your advertising promotion of the name Kash that deal with them on the pieces of fruit on the displays?

A Yes.

Q And that is 316 and 317 Exhibits that you are talking about? These little stickers?

A Yes.

Q Okay. Now, I am marking in another set of stickers as 318, Your Honor. Mr. Chang, I am showing you another group of stickers that I have marked

318, and they appear to be similar except they do not have a variety [2914] name with the label Kash. They just show Kash plus a little bowel [sic] of fruit.

(The document referred to was marked for identification as Petitioner's Exhibit 318.)

A Yes.

Q And I would like to show you those stickers and can you explain to me what they are and how they are different from 316 and 317, how is 318 different?

A Well originally we had these plain Kash ones made up because we've had a lot of requests from chain stores. If we had stickers or something for label identification of our fruit. And so we had these designed up for that specific purpose and so the people that request labels for our fruit then we will include it with them.

What we will do is rather than putting in the box at the time. We don't know ahead of time if they are going to order or when they are going to order so once we get the order we will include a stack of stickers with their order so that when the fruit is delivered the packet of stickers is delivered too.

Q And now as I understand the company's practice you will assist, sometimes, the chains in going ad to promote your Kash label. For example, in the Wileman-Kash-1 Trial, you put into evidence various newspaper ads where say a chain [2915] store such as Safeway or Kroger or such thing would say "Dear Customers, Come into my store and buy Kash, Inc. fruit."

A Yes we do.



Q And do you help them pay for those ads?

A Well, actually no we don't on that.

Q You do it a little different than Mr. Gerawan does then.

A We do it a little bit different. They kind of do this on their own accord. We will help them set up the ad and—

Q Do you give them a little price break on the fruit?

A Sometimes we will give them price break on the fruit. Like they will say "We want to come out with this kind of price." And we work it backwards.

Q Okay. Explain that. Mr. Gerawan talked about the 2 cent rebate program and that type of thing.

A Yes.

Q You do it a little different. You work it out right in the price of the fruit?

A Yes we do. Sometimes it's not even a discount. It is—they want to be able to come out with an ad—like let's say 79 cents a pound. And so they have certain markups and everything, and in and out costs, warehousing, [2916] transportation costs and so we kind of work it backwards as to what these costs are as to what we would end up having to sell it to them for to make this ad work.

And sometimes it's a—there are concessions made because they want to go on a red hot ad and we are figuring that the price is going to be at this level, you know, at a certain price and at this level you can't get this price on the ad. So then it ends up where they will take—we will kind of split the loss. Like there

might be a, you know, couple cent loss on their end and we will have to take a couple cents less a pound on our end.

Q To pay for this special ad?

A To pay for this special ad, yes.

Q And then the store, for example, will put the little Kash, Inc. stickers on the fruits and display Kash, Inc. banners in the store?

A Yes. Yes. And in other cases we have stores that want to go on ad, and they are going to do displays. And so they want our—we have a 35 pound, which is an eight inch high box, and so they like to use those boxes as front end panels on their display.

Unfortunately, what they want is the empty boxes rather than buying boxes with fruit in it, so— but in cases like that, you know, they will say "Can we have like 50 or 60 boxes." We will make them up and we will seal them [2917] empty and then, you know, hopefully with the order that they have, we will take the empty boxes and stick them on top of the fruit, whatever room there is between for the truck and the top of the food and stick it in there so that when it goes into the warehouse, then they can use them.

Q And those large boxes like that they have Kash emblems and Kash label on them?

A Yes. I don't know if you took any of those pictures that we had.

Q I thought I did, it appears that what I ended up with, however, is some pictures of your Kash-Chilean labeled boxes and some of your promotion activities in—with the Kash label in—Oh, maybe this is it.



Your Honor, I want to show the witness a picture. Is that what you are referring to? If so I will mark it.

A No, this isn't. This is another display that they had in Singapore. But what they would be, is if you had fruit on here, Your Honor, they would have these boxes stacked up, and then they would have the fruit going on top of the boxes so that it would look like just a mass display. And then you would just see the whole front end just being all Kash.

We had the director of merchandising in Kroger send us pictures of ads they did. It is not this one but it is just like if you had these boxes stacked up in front of [2918] this, and then you just had the fruit coming off the boxes.

MR. COOPER: That one is not in English is it?

THE WITNESS: No, this is an ad that was done in Singapore.

MR. COOPER: I was trying to read it.

BY MR. CAMPAGNE

Q I will mark that and—

A It's even better if you look at the prices.

Q I will mark that next in order which is 319. So if I understand what you are saying with respect say for Kroger going on ad, Kroger will call you up and say "Look, we want to go on ad in about three weeks." And then you will work a deal with them that if they push your label, you will help them out a little bit on the ad costs.

(The document referred to was marked for identification as Petitioner's Exhibit 319.)

A Well, basically on Kroger we—they never asked that.

Q Okay. There are other stores—

A What we did for like Kroger, and I think it was Albertsons, is that they ask for boxes.

Q With your name on it?

A Display boxes. So we provided display boxes at no charge.

[2919] Q Okay. And as I understand it they then built an area in their store where the fruit stands out as being Kash, Inc. fruit?

A Yes.

Q And it—the way I envision it from your testimony it that it got the fruit sitting there in their air conditioned areas and then they have got stacks and stacks of your boxes right there so it glares out as Kash, Inc. fruit.

A yeah. Basically, if this was a produce section and this was a wall and this is where you had your fruit, the Kash box would be stacked in front of this to the height of the table, then the fruit would be coming off of here, and go up to the top of the boxes for their display. So all you see is the fruit on—a cascade of fruit and then you just see the front end of the Kash box. And it will just say Kash across the whole table.

Q I see.

A Wherever the section is.

Q Okay. Now, with regard to this Singapore picture, I see that you are displaying the name Kash on the boxes and I take it that caricature means Kash?

A I am not Chinese and I'm still having trouble learning English. I really couldn't tell you what the Chinese characters say.

[2920]

Q You father-in-law told me that that is the caricature. Do you have any understanding with respect to that caricature? Or I'd have to ask him?

A You'd have to ask him.

Q You are Korean?

A Yes, but I was born here.

Q Okay. And I have another picture here that I would like to mark as 320. And is this a picture of your label from Chile?

A Yes. That's our—this is the label used out of Chile, South America.

(The document referred to was marked for identification as Petitioner's Exhibit 320.)

Q Will you show the Judge that? And again it's got the fruit bowl logo of yours?

A Yes it does.

Q The same little fruit bowl that—

A That is on the little stickers.

Q So on all these little stickers 317, 316 and 318. Why do you spend money promoting the name Kash that little logo of the fruit bowl with the red, white and blue design?

A Well, we are very proud of our company and we are very proud of the quality of the product we put out. And we feel that—Well, put it this way. If generic advertising [2921] did the job it was suppose [sic] to do, I shouldn't have to do what I am doing today.

But, I just don't see where it is really selling our product, and so this is something that we felt we had to do in order to stay competitive and stay viable in the market place.

There advertising part, the generic advertising is—

MR. COOPER: Your Honor, just for the record, and I do not want in [sic] interrupt Mr. Chang from telling his story, but we do want to pose an objection this type of testimony. He is going to the effectiveness in the marketing order and beyond the scope of what a 15a proceeding is suppose [sic] to be about under the decisions of the judicial officer. And I just thought the record should reflect that.

MR. CAMPAGNE: Same exceptions like you raised with Mr. Gerawan that type of objection?

MR. COOPER: I—It is [sic] been so long since Mr. Gerawan was here, I do not recall exactly what the objections were. But the objections are to the fact that the effectiveness in the marketing order is not at issue in a 15a proceeding, and therefore Mr. Chang testifying as to the effectiveness of generic advertising versus his type of advertising is something that should be outside the scope of the proceeding.

[2922] JUDGE BAKER: Do you want to respond to that? I believe you already have, Mr. Campagne.

MR. CAMPAGNE: Yes Your Honor. One of the First Amendment issues is of course—there is a



large number of subdivisions in the First Amendment issue, Your Honor. The first, of course, being whether or not the government has any real interest in caring whether or not Americans eat peaches, plums and nectarines as opposed to bananas and casabas.

The second issue being, with respect to the First Amendment in particular, the whole issue of association or non association—the right to—freedom to associate and/or not to associate. That is the right to refrain from helping your competitor in this state and other states, and other countries.

Also, the philosophical issues in that respect. Obviously this type of testimony gets into some of the issues that were discussed in the *Frame* decision, in the *Abood* decision and in many of the other decisions that we have talked about in our opening pretrial brief.

That is Mr. Chang's, Kash, Inc.'s problems with generic advertising and why they feel it does not work. And more importantly, if to any extent it works, it aids their competitors, it does not aid them. And it promulgates messages either expressly and/or implicitly that they [2923] believe lies to the public if it works to the detriment of their product.

JUDGE BAKER: Very well. Thank you. In view of the issues which have been made in this proceeding, as well as the additional challenge to the Secretary's promulgation of the Regulation with respect to whether he—There was a recent decision with respect to the publishing [sic] certain regulations, and the consideration of all the aspects of the order, the objection is overruled.

MS. BOUTROUS: Your Honor, I would just like to add for objection that 1) Effectiveness is not an issue in the First Amendment challenge, not in *Abood* or any of the First Amendment cases, not effectiveness, is not an issue.

Government interests, yes. Government interest is laid out by congress.

Nextly, as far as the other challenges go as to the promulgation of [sic] advertising program, that could only be—The only thing that can be considered there is the record that was before the Secretary at the time of his decision to promulgate the provision. Not by new evidence gathered at a 15a proceeding, so it would be irrelevant to that purpose also.

JUDGE BAKER: Very Well. Thank you Mrs. Boutrous. However the objections are overruled. And Mr. Chang, it is refreshing to have a witness who wants to come and tell the [2924] story of his company and how it operates.

THE WITNESS: Thank you.

JUDGE BAKER: Your welcome.

BY MR. CAMPAGNE

Q Just detracting for one second. There was one more exhibit that I would like to mark. You had mentioned that you prepared various posters, that type of thing and I have one document here that, I believe, is a sample of a poster which I have marked in as Exhibit 321. It says "Fall in love with a Sweet-heart plum." And below is [sic] says Kash, Inc. with the fruit bowl [sic] logo, red, white and blue. And then it shows a lot of plums with the little Kash, Inc. little stickers on it.



(The document referred to was marked for identification as Petitioner's Exhibit 321.)

A Yes.

Q Is this type of posters [sic] you are talking about having spent money on?

A Yes it is.

Q Why does it have this little perforation on the bottom of the poster?

A Well, the reason we have this is that a lot of times on a display you are going to have a box of fruit sitting down. And the perforations is so that it can sit in [2925] the back of the box as a little bulletin board background for the fruit.

Q So that if the store owner were to place your Kash, Inc. boxes on this table for example, he could then bend these little perforations and it would hook on to the back of the box and stick up nice and tall—

A Yes.

Q —so that the lady or man at the grocery store would note that's Kash Sweetheart plum.

A Yes.

Q You have a similar poster, I take it, with other commodities in Kash names?

A Yes, we do. Also there is a, you can probably see it better from the backside, there is a little thing so that you can hang it.

Q Oh, there is a little hole at the top of the poster.

A Yes.

Q So the grocery store man can mount it.

A Yes.

Q In the Kash area where the Kash fruit is.

A Yes. Or you can do banners with it, you know.

Q Put a string through it and hang it up?

A Yes.

Q I see. I had not noticed that before.

[2926] JUDGE BAKER: You could almost put it up for Valentines Day.

THE WITNESS: Yes, that was one of the suggestions about making this heart shaped.

JUDGE BAKER: Thank you.

BY MR. CAMPAGNE

Q Do you know approximately how much money a year Kash, Inc. is paying to CTFA in all the assessment [sic] in total?

A No, I really couldn't tell you. I know it is over \$100,000, I believe.

Q Okay. I have the records here, so maybe we can enter a stipulation later. So, you are spending over \$100,000 a year in CTFA assessments of which I will represent approximately five ninths of that goes to generic advertising and for generic promotion. If all that money is being spent on generic advertising and genetic promotion, why are you spending money promoting the Kash, Inc. label?

A For two reasons. One is so people know who we are. And the other reason of spending the money on the Kash, Inc. label is that when California does their promotions and prices the fruit as the last two seasons in probably around the third week in June the

price goes down to \$4 or \$5 and you have to beg people to take product. You start wearing out knee pads, you wonder how effective our advertising really is. And if we didn't have advertising, [2927] would the price go any lower, I mean would conditions get any worse?

It is almost like we hit rock bottom to start with, you know, and so at least by having the label recognition, you get the customer's kind of in gear to take your product.

Q You try to get ahead of the pack?

A Pardon?

Q In sort of speaking, you are saying that you are—you want to get ahead of the pack? You want to get above the rest of the people?

A Yes. It is kind of what you want to do, is you want to lock your customers into you.

Q Not into your competitors?

A Not into my competitors. They kind of get into calling you for product irregardless of every Tom, Dick and Harry banging on their door trying to supply them with product, you know, the same varieties, the same commodities, or other competitive commodities, that he becomes very comfortable with what you are giving him, and then he relies on you as his major supplier.

So that when situations get into a supply exceeds demand, he is still pulling from you for what he needs rather than going shopping to one of my competitors.

Q Do you believe your fruit is better than your [2928] competitor's fruit?

A If I didn't believe that I wouldn't be here. I think everybody—it's like nobody has ugly children. Everybody believes they have the best, you know, and I believe our fruit is as good or better than anybody else.

Q Well then, do you resent you [sic] advertising assessment moneys being spent to help your competitors sell fruit?

A Yes I do and I think it is unfair as a producer in several ways. One of the ways is that as a producer we are spending money for advertising. But one of the people in this chain [sic] probably reaps one of the biggest profits is the retailer. Because when we advertise generic "buy California" and the customer hears it and goes to the store to buy California, who makes the money from that? And who pays for that advertising for them to go into that person's store?

Q You are saying the grocery store makes the money but California producers are paying for his advertisement?

A Right. He is kind of getting a free ride off of our advertising.

Q Okay.

A And I don't think that is fair. You know, yes sell the product at a price, but out of that price I still have to—all my cost factors have to come out of it. You know, if I sold product for 20 cents a pound and that was my [2929] profit, that would be great, you know. But it doesn't quite work that way.

Q So the grocery store is getting a free ride on your advertising dollar?

A Right. And I also—



Q Now, do you resent—Please continue.

A And I also feel that a lot of times when we go into—how do you want to say—national network advertising for generic product—

Q By that you mean when CTFA spends money advertising in other states?

A Yes. That I think we are helping my competitors in other states.

Q Can you give me an example?

A Well, as a good example to make an analogy last spring when they had the Chilean recall because of the cyanide on two grapes that was found —

Q Two berries?

A Two berries.

Q So they recalled all Chilean grapes?

A They recalled all Chilean fruit.

Q Including tree fruit?

A Including peaches, plums, nectarines and grapes from Chile. Excuse me apples and pears from Chile.

Q Because some weirdo had put cyanide on two berries [2930] of grapes?

A Yes. But if you saw in the movie clips and the news, there were some chain stores that took all fresh fruit off their store shelves.

Q Even produced in California and other states?

A They didn't know where it was produced. I mean the apples, the oranges, I mean, everything was off. They didn't want to take a chance. Now,—

Q You mean you are telling me some grocery stores did not know easily where the fruit had come from?

A No, they didn't. And if the people in the chains don't know where that product's from since each box has to be identified with a statement of origin.

Q Was a statement of origin on the box label itself?

A Yes. On, how you want to call it, the main end or the label end of the box. There has to be a statement of origin. Now, on our fruit from Chile, it has from Santiago, Chile. The stuff from California has California.

And so the person that is putting that—the fruit or product whatever it may be on the shelf from the master container or the box that it was shipped in, if he doesn't know where it come from, how do you expect the consumer to know where it comes from?

And so unfortunately never having the opportunity to go to other states during our season to see what [2931] "Colorado peaches" look like, peaches from Illinois, Michigan, many times they don't come into Fresno, so you never get to see what our competitor's crops varieties look like. You never know exactly what they are putting, as far as when they display peaches, if they just have the peaches there or are they advertising California peaches? And if they do advertise California peaches are they really California peaches? But just like when I was talking about the retailer, I don't know, you know, when we do an ad on buy California peaches—

Q You mean when CTFA does a generic ad on "Buy California Peaches?"



A When CTFA does a generic ad on "Buy California Peaches" in Illinois, and the person hears that jingle and goes to the store, you don't know exactly what that chain is promoting.

I mean, because the generic ads are not in conjunction with the chain store ads. And so if they are promoting Illinois peaches more than likely that is going to have high visibility. In other words, when you walk into the produce section, the first thing you are going to see is Illinois peaches, and unless it says Illinois peaches and you've got peaches on your mind, you're going to buy the first peach you see, especially if it looks good and appealing. And they may not be California.

[2932] But we are paying for that ad, you are hearing that ad, the idea of wanting to buy peaches would be created from [sic] this generic ad, but are they really buying California peaches? Who knows?

Looking at some of the Market News Surveys, I think they are not.

Q Okay. I would like to show you a Market News Survey that was painlessly put into evidence, and that is Exhibit 299, which looks like it is September of '89. First of all, I take it you get a Market News Survey at your company?

A Yes we do. We subscribe to it.

Q It comes to you, I take it, everyday?

A It is suppose [sic] to come everyday, however, sometimes you—Let me put it this way, they are in separate envelopes. Sometimes you will get three envelopes in one day.

Q So much for the U.S. Postal Service. Okay. And now what are these things?

A Well, basically what this does is it gives us an idea of what our products and competitive products are sell [sic] in different market areas in the major cities in the United States. We also we get these Market News Reports like out of New York, terminal market from various other terminal markets because this is the one that is produced by

\* \* \* \* \*

[2941] Q Commission?

A Yeah, or a flat rate per package. And that won't be reflected in here because you might end up selling three loads to Your Honor through me, that is never going to reflect into this, because it never went to the terminal market.

Q Because the title went from me directly to Her Honor, in that example. Whereas, if I shipped to you, the owner of the New York terminal, then you took title and you sent me paycheck or a check for that purchase, and you got title, you got the bill of lading to that load, now it is your fruit. You own it.

A And then I report it.

Q And then you report it on this document down at Exhibit 299. You took direct title.

A Yes.

Q And you report it when you resell it, so these are the resell prices?

A Yes.

JUDGE BAKER: To the extent there are these private contracts and what influence, if any, would generic advertising have?

THE WITNESS: On the private contacts [sic]?

JUDGE BAKER: Yes.

THE WITNESS: They won't have any. In other [2942] words, if a chain store, major chain store is not going to stick its neck out and advertise nectarines when he doesn't know if he is going to be able to get the supply for one; and what kind of price is he going to get to supply. And so usually the two things that he looks for before he puts out an ad, and not end up with egg on his face and sued by his customers when the ad breaks and he has no nectarines, is that he wants a guarantee of supply from his customers, and usually he wants some kind of a "price lid."

BY MR. CAMPAGNE

Q Price what?

A A price lid. In other words, you are looking into your crystal ball of what is going to happen to the market three weeks down the road. I mean, it can go up it can come down. He's got to send an ad in the paper. And so what he wants to do is he's got a range and he can set that ad. And usually he has that range until about the week before the ad breaks. In other words the only times the fruit section where you have all the advertisements is on Thursday. So tomorrow would be the last day to change an ad to [sic] that comes out next Thursday. Friday it's too late.

Q So you make sure you have a lot of pull. So somehow you get your ad in seven days before it runs in the newspaper?

A Minor changes. As far as the layout and [2943] everything, it's three weeks ahead.

Q Oh, so for how much space you want, you order that three weeks in advance, but minor language changes have got to be submitted in [sic] final seven days before the newspaper runs?

A Yes. So anyway, he has a range that he can play with but still you are talking about seven days out. You still don't know what is going to happen to that price. What he needs is a protection that if he is going to go out at 79 cents a pound, and basically—I don't have a calculator so I am a little bit slower. But it is at 25 pounds—what is that? About \$12, \$10?

You are probably looking at a \$12 FOB in order for him to go out at the 79 cents, roughly.

Q FOB point of shipment?

A Point of shipment. And let's just say that in the interim the market just goes crazy, and the market goes up to \$16 or \$18 for the same product, he's committed. Now it says 79 cents a pound irregardless of what that product costs him. He can lose a small fortune. So usually he wants some kind of protection that if —

Q That's why you call us up?

A Yes. That at a certain point we won't charge him anymore than that, you know, so he might say give me a \$14 lid or something like that. So, if it goes above \$14 the [2944] maximum we will charge him is \$14.

Q And that is what you call a private contract arrangement?



A Yes.

Q And is that what you are referring [*sic*] that you told the Judge that generic advertising does not affect that at all?

A Those aren't going to affect it because, unless he has a couple of these criteria that [*sic*] just talked about, he is not going to stick his neck out a lot of times. Because, why should he take that chance and end up with mud in his face?

You know, being in—if you are in New York, Chicago or whatever, you never know what is going to happen, the weather conditions, what's happening to the crop, you know, because you might be advertising large size nectarines, and we have a draught and all the nectarines that have been harvesting are coming off small. Now, where does he find large size nectarines and especially if he's got 300 stores that he's got to supply?

It's things like this, you know, if there's a chain store in Denver, I don't know exactly how many stores they have now, but I mean on an ad just this one chain store, they are not a Safeway, they will pull 40-50 truck loads of product in a week.

[2945] Q They will do that by private contact. They are not going to buy from the terminal markets.

A They will do it by private contact with three or four packing houses.

Q They will call Kash, or Gerawan.

A What they will do is like they may take five or six loads from me, maybe from Gerawan 10-15 load, and part of the thing that the [*sic*] do is they are looking at protecting themselves. Because if they

just go to one supplier, and let's say the price goes up and the supplier is having problems, I mean he is legitimately having quality problems, pack out the bags, getting a lot of colorage, and he tells the guy, I can only give you half of what you need. You know, he ends up with all his eggs in one basket and where does he go to, to get the supply?

Q Well, let's say—

A And so that is why he'll, a lot of time to spread out his risks, will go with several people.

Q Now, what makes that large private contract buyer seeking the lid to go on [*sic*] ad, what makes him call say Kash and Gerawan as opposed to your competitors?

A Well, a lot of times it's not so much that he calls us, we call him. And we tell him—because we are looking at what our situation is. And we see based on historical records and during the season how the fruit [2946] sizing is, we know we are going to have a lot of volume in four weeks, and that you are not going to move it all selling on a day to day.

So you will go out to maybe a couple of people, and you will promote yourself. And say, you know, we are going to have good supplies of you know, large size nectarines or whatever it may be. And you know, and we will tell them the variety of whatever and basically what we do is we get them interested in promoting our ads.

Q How do you get them interested in Kash rather than one of your competitors?

A How we get them interested in Kash is basically, these are customers that we have been dealing



with on a long term basis. And so it is not really having to promote Kash, it is having the promote our fruit. Basically, it is having them promote fruit and hoping that with the rapport that he will promote our fruit.

Q Okay. And have trust in the quality of your fruit and the consistency of your fruit and that sort of thing?

A Yes.

Q Now, changing the subject from these large lid private contract buyers who do not go through a terminal market, but then again, in other words, getting the subject to the terminal market, say the New York terminal market buyer?

[2954] Q In California?

A In California, and it seems like it's really helping my competitors in other states.

Q Okay.

A And the biggest problem is my competitor in other states aren't contributing to the promotion that I'm having to—that I am forced to pay.

Q Okay. And I take it you are testifying in response to Her Honor's question with regard to these large private contract "lid" buyers. You do not think generic advertising affects them at all, they are looking for calling Kash directly.

A Yes. The main problem on generic advertising is that the advertising many times is done way before the product is going to be there. In other words, if the time I heard California Tree Fruit advertised, I went out to look for peaches, it would be highly doubtful you will find any California peaches on the market

place. You might find some Chilean peaches. But it is just the way generic advertising is set up. It has got to be set up in advance.

And it doesn't necessarily coincide with when you [sic] peaks are. And when I have peak volume it doesn't necessarily mean Mr. Elliott or Mr. Gerawan is going to be a peak volume the same time I am. You know, we have the same varieties and the same proportional amount of acreage [2955] of that variety, then yes it may hold true. But you know, being basically like Mr. Gerawan said, a free enterprise, he plants what he feels is good varieties, and I plant what I feel is good varieties to fit my program and so you are going to get different times where you are going to have an abundant amount of fruit.

And when it peaks where California may be different then [sic] when it peaks for ourselves. A lot of people—

Q You mean for Kash?

A For Kash, Inc. A lot of people have always traditionally kind of stereotyped the Fourth of July as always being a bad time to have product because the market always seems to go in the dumps. And a lot of growers have pulled fruit out that normally comes off before the Fourth of July. And that goes through the first 10 days of July.

The last three years that has been one of our better market places as far as price per pound has been right after the Fourth of July. And so consequently, I mean, there are going to be farmers that are not going to have anything in production whereas the State of California may still have, you know, accord-

ing to their estimates and where it has actually happen [*sic*], fairly large production in California.

And so it doesn't fit everybody's needs, the [2956] generic advertising. It tries to tailor it to everybody as much as it can, but then it lumps everybody into one category of being the same.

Q Does that hurt you as Kash, Inc.?

A And it hurts me as Kash, Inc. because—and for the same reason that Mr. Gerawan testified, that his fruit is the best. I feel my fruit is the best.

Q You do not want to be the same.

A You don't want to be lumped the same, and I mean impact [*sic*] do you have on a buyer when you go him and say "Well, my fruit is pretty good."

Q It is the same as everybody else.

A It is the same as everybody else. And I mean it goes over real good and you have a very short visit with that customer.

Q But my color is just about the same as everybody else [*sic*] color.

A Exactly.

Q That same customer is not going to buy.

A And so, you know, it—the generic advertising does a couple of things. One, philosophically for me it perpetuates a lie in the fact that it does put everybody in same [*sic*]. And everybody is not the same. Every variety—it puts all peaches being the same, all nectarines being the same, and I think in earlier testimony it was brought up [2957] that there was a peach that was beautiful, that was totally uneatable. And I know some plums that were developed that were

beautiful but totally uneatable and they have never been named.

Q Let us say I grow Flamekist nectarines, and you grow Flamekist nectarines. Are they the same?

A Well, that's the other part. No it is not. And—

Q And you think that is a lie too?

A Part of what the generic promotion does do is not only is everything the same, but "red tastes better." And red doesn't taste better. It's only—it's like "beauty is only skin deep."

One of the things that we've done on our new variety is as far as like the Sweetheart, we've only done—we've only had small production of the Sweethearts. We were suppose [*sic*] to have fairly good production last year but we got hit by two hails. And so we did an ad on Sweethearts in Cincinnati two years ago.

Q Using the Kash, Inc. label. It was not generic I take it.

A Using Kash, Inc. label, and what we did is we took—I think we had a total of like eight boxes. It was the first year of production, I mean we weren't going out like gang busters. And we took the culls and we gave the [*sic*] to the chain store, and had them take the culls and slice them [2958] up. And it was a regional chain that do [*sic*] a lot of this kind of thing. I was very impressed with it.

And what they do, is they will take [*sic*] plate with little pieces of fruit cut up and they will have tooth picks in it and they will go through the store and they will tell, you know, we have it on special in the produce section. And it went over like gang busters. When I first saw this when I visited the chain about



three years ago, and it was on a marketing trip and it was the latter part of April like this pineapples [sic]. And they had this tray and you [sic] around and you taste it.

And one of the other things they did is they had this corp. They took the pineapple and they cut [sic] the top off, and they have this machine that is like a plunger and it just cuts just on the inside of the skin and it cuts the center out. The [sic] leave it all back together and they put it on a little styrofoam tray and they shrink wrap it. And they were selling these things like for \$2.99 a piece.

You know, the gal that has these samples, she doesn't tell you what the price is, but she does tell you, you know, that we have it on special. They are promoting this in the produce section, you know. And you eat it and the pineapple taste like candy. And you know, you take it home and you just take it out, and you just cut and all you have to do is slice it up and it is ready to eat.

[2959]I was talking to the buyer about it, the produce buyer. He was taking us around so we could see one of his newer stores when they were doing this. And he said that in 10 days they sold like 40 container loads of these pineapples.

Q What does a container [sic]? About 1,000 boxes?

A A contain of—fully filled container, I don't know exactly what it holds in pineapples but it should hold about roughly 40,000 pounds per container.

Q In one store?

A They had 26 stores. It just kind of blew my mind that you can move that many. One of the things that makes it very attractive is that I never knew how to

pick a ripe pineapple. The way you see it whole, you know, you cut it well should I or shouldn't I. Most of the time I don't. But when you can taste it like that it is really an added incentive. Hey this tastes great, you know, I want to buy some.

And to me that is the best promotion there is, is that you try it, you like it, you buy it. And it's like that in anything, I mean you buy peaches, nectarines, plums whatever, you take it home, you eat it, it's good, you are going to go back and buy more. And that is the repeat business that we want, that's what is going to move product.

Q And that is why you are spending money promoting [2960] Kash's label and trying to direct consumer—solicit that way?

A Yes.

Q Do you think that is effective for Kash without affecting or helping your competitors I take it?

A Yes, exactly.

Q You do not want to help your competitors ?

A I don't want to help my competitors. I don't want to help Ray Gerawan. You're the one that wanted me to testify at this hearing, you know, more power to him. But it's like you said, it's everyone for himself.

Q Okay.

A But the one thing that—because we are promoting kind of like a sameness, of everything being the same—

Q You mean CTFA is promoting that?



A CTFA and the their generic promotion, I mean they are promoting "red tastes better"—

Q You think that is a lie?

A These are things we don't believe in. We feel it's a lie. And philosophically, I mean, we really don't believe in lying. And by having to like a "forced taxation" and paying the assessment, actually we are promulgating the lie.

Q You are being forced to participate in the lies or the innuendos that are not correct.

[2961] A That's right.

Q From the generic advertising program.

A From the generic advertising program, correct.

Q And I guess you are saying that all plums do not taste the same, all California plums do not taste the same. Different varieties taste different, and the same variety grown by different growers taste different.

A This is the problem the generic advertising is [sic] that this is what you are promoting. All nectarines taste the same, or all plums taste the same. So this becomes kind of stereo typed and ingrained into the consumer and you buy a plum or a nectarine and you don't like it. If you have the "mentality" of well "all nectarines are the same" and you taste a nectarine and you don't like it, you are doing to feel that all nectarines taste crummy like that. So why every [sic] buy anymore. I'm sure everybody's had something that they didn't like, be it an orange, or an apple, or whatever. And I mean, if you have that kind of mentality you would never buy anymore of that commodity.

Where would that put this industry or any produce industry? Get your own industry.

Q Would you agree with Mr. Gerawan's testimony to the effect that—something to the effect that if you are growing a Red Beaut plum and I am growing a Red Beaut plum, and we are on two separate farms a few miles apart, my Red [2962] Beaut plums might have different amount of soluble solids than your Red Beaut plums and therefore taste different?

A That's true. And it's also in color. I mean we have blocks that sometimes the product is almost like day and night.

Q I do not understand.

A It depends on soil condition. When you have sandy soil the trees are weaker so they don't develop. They are not as healthy as in other places where you have richer soil, where you have a lot of vegetated growth. And so on weaker trees you have a tendency to have smaller sizes. If you don't have smaller sizes then you have less of a crop, so that you can get the bigger size, but also you will have lesser foliage and higher color. When you get into—

Q Does that mean it will taste better because you have higher color?

A Not so much it will taste better but that's what's implied. That's what's implied by the California advertising. When you get into richer soil and you get a lot more vegetated growth—

Q More leaves?

A More leaves you are going to get less color on the fruit. Not so much that where color I am referring to, the red blush, usually you can load a heavier

crop on a tree, and still get the desirable size that you wanted.

[2963] Q Mr. Chang, I would like to place in front of you Exhibit 301 which is a booklet which says "989 Advertising Promotion Guide." This is the one that shows the four television ads marked at 301a, which is page 8; 301b which is page 9; 301c which is page 10; and 301d which is page 11. And I would like to ask you if you have any other philosophical differences with respect to the CTFA generic advertising program?

A I don't know if you would actually call it philosophical more than morally.

Q There's a moral difference you mean?

A There is [sic] are some things in this that I don't personally agree with. Being a father of young children some of these ads, I guess it depends on how you look at them, but I see it with—how do you want to say it—subliminal sexual connotations. And the rule of the way it has been with all the weird people and the things that have been in the news for the last couple years, it seems like it is getting worse and worse.

It kind of bothers me, in fact, and a lot of it is just the connotations of them. When you use a thing like you have a picture like this and the fruit is there but it's—three quarters of it is—

Q Mr. Chang, when you say a picture like this you have to tell which page.

[2964] A 301a.

Q Which is page?

A Page 8.

Q And which picture are you referring to? I guess it would be for the record Your Honor—

A In the middle, third down.

Q It is a picture, I will state for the record, it shows two children, and then underneath it says taste them and see so cool and juicy. And then let us look at 301b for example. Are you referring to 301b on page 9 as well?

A Yes, you know, you have so cool and juicy.

Q We have to point out what you are referring to.

A It will be in the middle, second picture from the top.

Q And here you have a young girl in a bathing suit, getting wet in a sprinkler and again no fruit, and just saying so cool and juicy, cool, calm and juicy?

A Yes.

Q And then the picture below it. What does it say?

A Taste them and see.

Q And it has a young girl.

A One of the things is that I know advertising does a lot of subliminal stuff and they use a lot of sex in advertising but one of the advertisements that I can remember that impacted me, that stayed with me was one of [2965] the Pepsi ads. With this guy laying in the sun, he was on the beach, and you know, it gives the impression of being hot. There is no music, it is just totally quiet. And he takes this can of Pepsi, and he pops it, and you hear the fizz, and then you can hear him gulping it.

Now, you know, to me that was an impressive ad. Because one, you saw it and it looked good. It was



cold, it was refreshing, and you wanted to have a Pepsi. I mean there are no sexual connotations or anything in there. I mean, to me that was a good effective ad. And it stayed with you, I mean, you remembered the Pepsi.

Q Without some subliminal message that you disagree with morally.

A Yeah, I mean, you hear about like the McMartin case, and all these other things that are happening.

Q Where people abuse children you mean?

A Yes. And it seems like newspapers more and more are coming out with teachers with children.

Q Teachers abusing young children you mean?

A Yes. And so why give anybody any ideas. It is just like which came first the chicken or the egg, you know. You start advertising, or the news picks hijacking, and they make movies of hijacking, and it glamorizes hijacking, and more hijackings occur. Which actually came first, I don't know. But you know, why perpetuate an idea.

[2966] Q You do not use children and subliminal messages regarding children in your advertising of Kash, Inc., do you?

A We don't use people. We just use the fruit.

Q I take it that is the point you are trying to make. You do not think they need to use children.

A Well, I don't know what we are trying to sell. You know, what is our generic advertising trying to sell? My idea was it was suppose [sic] to sell fruit, so why not highlight the fruit?

Q Instead of having children in their wet bathing suits running around.

A Exactly.

Q Mr. Chang, can you think of any valid Federal Governmental interest that the Federal Government would have in promoting peach, plum and nectarine consumption in the United States of America?

A If you are referring to California peach, plum and nectarine, I see none. I think these Market News Reports verify that if it does have an impact on us, it is a negative impact as far as I am concerned. They should go advertise New Jersey peaches so we can get a higher price.

Q And let the New Jersey growers pay for it?

A And let the New Jersey growers pay for it. But I think it is more of a hinderance in more than one way. I [2967] know since the out come [sic] of "Wileman 1" I've had small packers come and express interest in what can they do like what we are doing? Because of the problems that they are having. And they are small packers, they have, you know, they grow and they pack their own fruit and they have like 40 acres and they may do a neighbor to make it a little more economical. But they don't have the money or the economic resources to go through a 15a. And they are also afraid of retribution of harassment by the government.

Now, if that is what our generic advertising is making all the growers afraid. But I've tried to talk to some of the people even to come and possibly testify. A lot of them are afraid.

Q Why do you think that is?



A Well, it is a combination of things. One is that they don't have the economic resources to fight, and because they are so small. I mean, a couple incidents [sic] could probably put them out of business. One season would probably be enough to put a real economic hardship on them.

Q I have a few other of these Market Reports to tag, Your Honor, just further examples in the record, not that it requires a bunch of testimony or anything.

You have been testifying with the Market Report that has been marked Exhibit 299. Your Honor, what is the next exhibit number?

\* \* \* \* \*

UNITED STATES DEPARTMENT OF  
AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

AMA DOCKET No. F&V 916-3  
AMA DOCKET No. F&V 917-4

IN THE MATTER OF:  
WILEMAN BROTHERS & ELLIOTT, INC.,  
A CALIFORNIA CORPORATION AND  
KASH, INC., A CALIFORNIA  
CORPORATION, PETITIONERS

v.

CLAYTON YUETTER,  
SECRETARY OF AGRICULTURE, RESPONDENT

[Excerpts from Testimony of Frank T. Elliott, III]

Fresno County Courthouse  
1100 Van Ness  
Fresno, California  
Tuesday, February 13, 1990

The above mentioned matter came on for hearing, before the Secretary of Agriculture, pursuant to Notice at 9:00 a.m.

Before: DOROTHEA A. BAKER, Administrative Law  
Judge

## APPEARANCES:

For the Government:

GREGORY COOPER, ESQ.

Ms. HELEN BOUTROUS, ESQ.

U.S. Department of Agriculture

Office of General Counsel

Marketing Division

14th &amp; Independence Avenue

Washington, DC 20250

[3879]

Q Okay. Now do you resent your assessments being spent on generic advertising?

A Yes.

Q And let me ask you a few questions about that. First I wanted to ask you, can you think of any governmental interest whatsoever that the Federal Government has in asking the public to eat California nectarines or peaches or plums?

A I'd like to break this down. I don't see a reason that the Department of Agriculture has. Maybe it might be of interest for the Department of HEW to promote people eating fruit for their good health. But, one, for them to tax me to promote peaches, plums and nectarines and they're not taxing people in other states to do the same thing and the housewife when she goes into the store, in that bin, doesn't know where the fruit came from. Very rarely is there a sticker on there. Even in California, you go into a store today and you won't see a thing that says "nectarines from Chile".

You see oranges, you go to the mid-west and they don't tell you whether they're Florida oranges or they're California oranges. They don't tell you if the bananas came from Nicaragua or Honduras or Guatemala. They're bananas; they're oranges; they're plums; they're nectarines. And there's no designation to the housewife, so [3880] she doesn't know what she's getting.

So basically what the Department of Agriculture's doing is taxing me to help everybody. I think that's kind of unfair taxation.

Some of the other problems that I have with specifically the generic advertising that's being done is most of it is a big fraud.



Q Are you saying that the scripts on the TV and the radio scripts are frauds?

A Well, from the publications that I get at the office and we get—periodically CTFA in trying to promote its own welfare to the shippers sends out little samplers of what they're doing. They're trying, you know, to maintain an image and we do get some advertising—here locally on the local radio stations. This is so that CTFA can prove that they're doing something to the growers which is even more ridiculous, to spend my money for them to advertise themselves to me. Do I see that right?

Q I think I understood your point.

A I mean for them to tax me, to tell me how good they are, is extremely ludicrous. Then they come out with these things about red is great; you know, how wonderful the red nectarines are. While, in fact, if you take somebody like Bear Creek Orchards, which is probably the pickiest buyer in the produce industry, where they're getting an [3881] outrageous amount of money for this little tiny box of fruit and they want an extremely premium piece of fruit; they don't care what it looks like. They're only interested in what it tastes like.

Q For the Fruit of the Month dealers?

A Yes. And they don't take any red varieties. They're only yellow varieties or what we would consider yellow varieties.

Q So you're saying that generic advertising promotes a lie that red is better than yellow?

A Well, yes, among other things. It also says that California fruit is better. Well, now the housewife, she doesn't know the difference. And I don't think anybody has ever proved that there's any difference.

Q You say that—are you saying that in your opinion, do you think that the advertising or the implication of the advertising, eat California fruit, is a lie because California fruit is no better, no worse than fruit grown in other states?

A Well, I don't know if it. It might be; it might not be. I don't think that anybody has ever come up and proven that. But I can't see what interest it is of the Department of Agriculture to tax me to go out and promote this stuff and then not tax somebody else or force them to do the same thing. It's a lie; it's unfair competition for [3882] me by being taxed to promote this other guy's product and the housewife doesn't know the difference.

Q Do you—I guess you're saying, therefore, that you resent your advertising assessments being used to promote Georgia peach growers, Georgia nectarine growers, et cetera.

A Another thing is that the target of their advertising isn't even to the people that I normally sell to.

Q Now wait a minute; that's an interesting point. I don't think we've heard much testimony about that before. What do you mean the "target of their advertising", of CTFA advertising assessments, is not the same people you sell to?

A Well, there's—in running a produce operation like ours, a grower, packer, shipper, there's basically two different theories of how you sell and move your produce. If you take just the people that have testified here so far, we'll take Mr. Chang and Mr. Gerawan. Mr. Gerawan has a sales force of, I don't know, twenty, twenty-five people. And I'm not sure how big Mr. Kashiki's is, but I think it's probably three people, somewhere in that neighborhood. In the case of Mr. Gerawan he's more than likely, and again

I'm—I'm kind of speculating—is selling directly to chain stores. All right? And probably [3883] in the case of Kash, does a pretty good chain store business. He has all of his three people selling out of the same pool.

Q Give me that—Gerawan and Kash are selling to retailers?

A It's called direct—yes, selling direct to the retailers.

Q Okay.

A We, on the other hand—

Q You don't deal that?

A No. We deal primarily with brokers and jobbers. So instead of us putting together loads and then sending them on to the chain stores, we deal with the broker who then would consolidate the chain store—

Q Is a layman word for broker that I might use would be a wholesaler?

A Well, he could be a wholesaler. Some brokers are just brokers; they consolidate loads for different wholesalers. And for that, we pay this man a fee. He gets anywhere from ten to fifteen cents a package that we pay him commission for doing this.

Q So do you have less salesman?

A We have one salesman.

Q He's just selling to wholesalers or brokers, I take it? [3884]

A Yes. We do very little chain store direct business.

Q Let me see if I understand this in my mind. You don't take what I call LTD loads, less than truckloads; you don't take a big truck and say put two pallets on it for Safeway and two pallets for Kroger and two pallets on it for Lucky, and tell the truck

driver to drive across the country and drop these things off at various retail stores? Instead you just fill up the truck and you tell them to take it to one broker's place and dump it all. And then he resells it and then moves it through his clients?

A That would be what maybe the jobber would do. In some cases, we'll get a call from a man and he wants half a load. We'll put half a load of fruit on there.

Q Okay.

A Of plums or nectarines, "x" number of pallets or "x" number of boxes, depending on whether he's buying it palletized or not palletized. That truck then will go somewhere else and pick up maybe a half a load of strawberries or half a load of some other compatible product to—

Q To fit in the refrigeration—

A —to fill in the truck. And then that truck will go to the buyer and this one man, see there are several large brokers in this country like C. H. Robinson or Tom [3885] Lange or somebody like that. We're dealing maybe with C. H. Robinson, Minneapolis, and they will be putting together loads for small regional chain store operations.

Some guy that has ten stores, it doesn't pay for him to have national buyers on the West Coast. Okay?

Q And they'll use people like this to help?

A They'll use somebody like this to actually do their purchasing. And our philosophy is to do business with them for a number of reasons, one of which is, we like the pay and if you start dealing too much with large chain stores, they have a tendency to want to run your business, to dictate to you what you're going to do.

Q And what you're going to sell it to them for?



A Yeah. And we tend to like to run our own business; we don't like other people telling us how to run our business.

Q Okay.

A Which is hard for CTFA to understand; I understand that.

Q Now if I understand what you're saying then, you're saying that not only do you think the message that the generic advertising is giving is a lie in certain instances, but you're thinking it's being communicated to people that are different than the people you sell to?

A Yes. The guy who is buying our nectarine is [3886] buying a nectarine. He's not buying our nectarine because it's a California nectarine. He's buying our nectarine because he happens to like the Mr. Sunshine brand of nectarine and he'll know that it will arrive in a quality that will make it to his customers.

Q What is Mr. Sunshine?

A That's our brand of—

Q Label?

A Our produce, what we ship; our primary label is Mr. Sunshine. Our second quality label in plums, nectarines—well, you don't have a second in plums, but is Look.

Q Excuse me, I didn't hear that.

A Look. L-O-O-K.

Q Okay.

A And we have another label we use citrus fruit, which is a different thing, but if you're going into two markets with citrus, like in two—two people shipping into the same export market, we can give them a different label, which is Stop. And these labels were developed back in the 20's; they're not new.

Q They've been around a while?

A Yes. They've been around a while. Our grape label is Bluebird. We also have a label called Sunshine To Go, which we use in consumer packs of oranges, which is an [3887] icicle with the wheels of orange slices.

Q I see. And so if I understand what you're saying, these jobbers or brokers that you sell to, they're buying from you because of identity of you—

A Yes.

Q —rather than because you're in California?

A They can buy the nectarines or the plums anywhere. They can buy it from any state. I don't know how many states produce nectarines but they're not grown only in California. And the same thing with plums.

Q Okay. Why do you think they're buying your plums rather than plums grown in another state or plums grown by one of your competitors in California? Are you saying it has identity with your label and they know your company?

A Well, that and salesmanship. We obviously have spent a lot of time and energy promoting our product to them and trying to convince them that we put out a good product. Right now this week my sales manager is back in San Antonio at the United Fresh Fruit and Vegetable convention. And he is meeting with these people this week.

Q These are the brokers and the jobbers—

A Yes.

Q —that you sell to?

A In the fall, we go to the PMA, which is [3888] another Product Market Association, a big convention. And then usually we send the sales manager in or myself makes two trips back to the East to contact



these people face to face. The object is to put a face on the end of a voice on a telephone, so you know who you're talking to.

They see in the—if you go into these markets, terminal markets, like Hunts Point, New York; the fruits displayed. The people see what they're buying. They have bird-dogs that come around to your packing house here in the Valley; they're not buying a pig in a poke; they know exactly what you're putting out, what it looks like, whether it's got legs or not. Legs, being green enough to make arrival. So if it's overripe fruit and you send it to the East Coast, they don't want it if it won't make arrival for what they want.

And, again, it goes back to who we're selling to. You've got different—it if goes from the packing house directly to a chain store warehouse, from there it is trans-shipped out to trucks, on to trucks to go out to their stores. They want a little higher maturity. If it goes from here into a truck, goes back and sits on a dock in New York City in the middle of summer for twenty-four to forty-eight hours, from there is put into a non-refrigerated truck, taken to a little "Mom and Pop" store, where it is then displayed outside in Brooklyn, they want a product that [3889] will get there.

And they come and look at ours, make that determination. They don't care where it comes from as long as it's something that will make arrival. So to sit there and advertise, California, "Eat California nectarines; they're the best", these people don't care about that. They don't call us up and say, "We want one load of California nectarines and we want one load of Georgia peaches". They call us up, "We want, you know, five hundred boxes of Sunshine"—Mr. Sun-

shine—usually it's just called Sunshine, we drop the "Mr."—"We want Sunshine Tom Grands, size such and such; the truck will be there such and such a date". And that's it.

Q Now when you say "terminal markets", is that a jobber market or a wholesale market?

A Yes. This is primarily where you'd see the jobbers do it. Most large cities have them. It's a produce district.

Q All right. Can you explain that?

A Well, let's back up a little bit. If you have one or two or three grocery stores, it would be extremely or even a little tiny hole in the wall like you have in some of the large Eastern cities, what we would call maybe a convenience market here, little neighborhood market; it's extremely difficult for them to employ a full-time buyer to [3890] buy their produce. Produce has to be bought fresh. So these districts in the city have been established to, basically, allow a market—and probably grow out of a Farmer's Market—a marketplace where these people can acquire fresh produce.

Q And is that what's the so-called "terminal markets" are located at?

A Yes. Like there's one in Los Angeles.

Q New York?

A Yeah, New York; most large Eastern—well, most large cities have them, where the produce people have either by Statute or by custom come together. And this is where the—

Q So if I'm a terminal market owner in New York, let's say, or Minneapolis or Philadelphia, I would call you up, buy Mr. Sunshine, for example; it would be delivered to my terminal market in New York. I'd

break that pallet out and then I would sell smaller amounts to the little stores?

A Say if you bought ten pallets, all right, you know this store sold "x" number of boxes a day in plums, you'd put ten or nine of them in the back of the warehouse; you'd take one pallet, set it up in front of your business establishment and display it. Open boxes up, so people can come buy and look at the product, see what you're selling. I mean, you're basically—

[3891]

Q The little chain—the little store owners can come up?

A Yeah, the little store owners or it might be a guy that has a van, you know, a sixteen foot bed on it with a box and he is buying for seven or eight little grocery stores. And he will come by and he will buy from the guy in the terminal market, load up his truck, not only with plums—he might only buy two boxes for each little store, not only for the—not only plums, but he'll buy bananas and every other kind of produce that this guy needs in his little store.

Q Now you were here during Rodney Chang's testimony and Ray Gerawan's testimony, correct?

A Yes.

Q And you heard them, or one of them, talking about the market news reports—

A Yes.

Q —I think Exhibit 229, et cetera, other exhibits about market news reports. Are those terminal market news reports?

A They are the—the market—is one of the sources of the market news is the terminal market. What people are selling for on the street. Now I think that because it's operated by the USDA, each guy in

each market has his different sources. And without knowing—talking [3892] to specifically the man that reports the market in each place, you don't know what the man's sources are. But in most cases that office is near the terminal market because that's where the greatest volume of fruit goes through in some months.

Q I see.

A It's easiest to find out because it's there. You don't know what business is transacted with chain stores. I mean that is direct, bypasses this area, the large chain stores, but the small chain stores buy a lot of fruit in the terminal market.

Q And it bypasses the large chain stores—

A Also, the large chain stores use the terminal market, say all of a sudden they find out it's Thursday and they have—they've got a special coming out on oranges or bananas or whatever on Friday, and all of a sudden they decide, "God, we need one more"—well, terminal markets is where they go get it. You know, it's—they don't have time—

Q To do it themselves?

A To do it themselves.

Q I see. Now in addition to the large amount of money that you, yourself, have been paying in CTFA assessments to our trust account here, you, yourself, spend money advertising your own labels, don't you? [3893]

A Yes.

Q And how much money do you assume that your company spent advertising your own label or labels?

A Travel expense—I can't remember because it was on the—on our financial statement—but I'm going to say it's thirty or forty thousand dollars a year.



MR. COOPER: I couldn't hear that answer.

THE WITNESS: Thirty to forty thousand dollars a year.

BY MR. CAMPAGNE:

Q For just the travel expense?

A Yeah, travel and entertainment, which is primarily to buyers.

Q That's when you go to the buyers—

A Market tours. You go to conventions.

Q These are to these jobbers and brokers that you had been talking about?

A Yeah. See that's—

Q Do you also have materials?

A We have printed material, which I gave you a copy of that brochure that we had which was sent through the industry.

MR. CAMPAGNE: Your Honor, may I mark that next in order?

JUDGE BAKER: Yes. 341.

[3894]

MR CAMPAGNE: Thank you.

BY MR. CAMPAGNE:

Q Let me hand you Exhibit 341, Mr. Elliott. Is this some of the material you hand out to brokers and jobbers that you deal with?

A Yes.

(The document referred to was marked for purposes of identification as Petitioner's Exhibit No. 341.)

Q Is that what you mean by throughout the industry?

A This on the first page shows some of our historic labels; the Bluebird, Flash—

Q This is a sampling of some of your labels?

A Yes.

Q On the first page.

A And then second page is a painting of my father and myself and a little history of both of us.

Q Looks like you're pushing the fact that your company has been existence for a number of years.

A Family company; family-owned business. Then the middle page shows oranges and pictures of Mr. Sunshine label, with a little verbiage. And then you get to the next page which shows the—

Q Mr. Nectarine?

A Mr. Nectarine, Mr. Peach, and Mr. Plum, which [3895] were out—when we were in wooden boxes, were our labels. And then as you get towards the end it shows more of the current labels of Look and Mr. Sunshine, both in citrus and tree fruit.

Q Why is it important for you to have the jobbers and wholesalers know your label?

A They're very label conscious in the terminal markets.

Q I don't understand; why?

A Well, they don't know—you could walk up to anybody in the terminal market and tell them "Wileman Brothers and Elliott" and they wouldn't know who you were. But if you tell them, you know, "Mr. Sunshine" they would be very familiar with the label. They would recognize the label. It's—I'm quite sure that you wouldn't know "Dan Drackett"; have you ever heard the name?

Q No.

A Have you ever heard of "Drano"?

Q Yes.

A Well, you know their label. You don't know their name, same thing. We promote our label. This is one of the things that has been very disturbing to me as I listened to Dan (Sic) Gerawan and Rodney Chang talk about how—



Q Ray Gerawan?

[3896]

A Ray Gerawan, rather, and Rodney Chang talk about how great their fruit is. And they've lied. Ours is better.

Q I take it that you're their competitors and you're saying your fruit is better?

A Yeah. That's the thing. We're all kind of—to say that we're competitors basically in sales only, because we don't have a lot of outside growers. Ray Gerawan doesn't have any outside growers. In the case of Mr. Kashiki he has few family friends as outside growers. We're not big—we're not big commercial houses.

Q You don't have outside growers?

A We've got about five small and, again, they're family friends who are outside growers.

Q What I'd call second hand relative type?

A Yeah. Primarily we're growing, packing, shipping, selling our own produce.

Q So you're not interested in taxing your clients to use their money to promote sales?

A No.

Q Because it's your money?

A I heard in the testimony—I can't remember who said it, the fact that the grower of these commercial houses is paying somebody like Ballantine ten percent to sell their fruit and then Ballantine turns around and [3897] charges them another twenty cents to do the same thing. It seems like—plus they're taxing me to do it for them too, I think is really outrageous.

Q Are you saying that you think it's outrageous that your tax assessments are being spent to promote Balentine's label?

A It appears to be. They're not promoting mine.

Q It's not helping you at all?

A No. I mean, just a straight example; when this started, I was informed about the great benefit of these guys going around to the marketplace, all right, and how they're helping me. I've called —

Q You mean Gary Van Sickle going around—

A No, these guys in the East that are supposed to go around and promote California fruit. I haven't been able to find anybody that we've done business with that's ever seen one. I don't know what they do.

Q They've never met a CTFA person?

A Well, no, they don't even know what California Tree Fruit Agreement is.

Q Is that because you're assuming these CTFA folks are going out to primarily the retailers whereas you're selling to the terminal markets, the jobbers and the wholesalers?

A They're going out to the big chain stores who [3898] I don't do business with. In other words, they're taxing me to promote somebody else's produce.

Q To help these large commercial people?

A That's right.

Q Or commercial packers, I should say.

(Pause.)

Q Mr. Elliott, I'd like to show you three Exhibits that we've stipulated into evidence. The first Exhibit is Exhibit 301, which—page eight, 301A, is a television ad that we've had testimony; it's been running for a few years; 301B is another television ad, is page nine; 301C on page ten; 301D, another television ad. Are those the television ads that you were testifying about a moment ago that you think is kind of ridiculous to be running in California?

A Yes, especially in the San Joaquin Valley.

Q Okay. I'd like to also show you Exhibit 303, which has been stipulated into evidence, as the radio scripts that have been used in the '86 harvest season and the '87 harvest season.

And I'd like to show you Exhibit 302, which is the radio scripts which have been stipulated in as the radio scripts for the harvest season '88 and '89.

Are these the radio scripts that you were referring to that you think is silly to be running in [3899] California?

A Yes. On the KMJ, on the Farm News. Again, it goes back to, they're taxing me to promote their own welfare, which I think maybe, you know, people like Gary Van Sickle out to cough up the money for that.

Q Now Mr. Field, do you think that—excuse me one second.

Now with respect to these Exhibits, 301, 302 and 303, are these the types of scripts of advertising that you were previously testifying you think promotes some lies?

A Yes.

Q Okay. And I take it that you're saying they have an implication that red is better and that California fruit is better and you think that's a lie?

A Well, I think that—first off, red is not better. Red may have more eye appeal to some people, but as I said what's considered by farmers to be the—and by Bear Creek Orchards to be the tastiest nectarine is the Le Grand nectarine. The peach that is supposed to be the tastiest peach is called a Nectar Peach. And there's a great bit white blob that is so tender that when you pick it you leave five little brown marks on it.

Q From your fingers?

A Only from your fingers, all right? Now I have one tree in my backyard, my mother has a tree in her [3900] backyard, Leonard Wileman has a tree in his backyard, my grandmother has a tree in her backyard, my sister has a tree in her backyard; everybody has one tree in their backyard, because when these things ripen, it's not commercially feasible to pick them. These red hard varieties are the ones that, you know, because of their maturity standard they can get red and they can ship them as hard as billy clubs (phonetic) and get away with it. But they're not necessarily the best eating piece of fruit. And to tell people that red is wonderful is a great lie. I mean, that is—

Q And you have a philosophical difference in lies?

A Yes.

Q You don't believe in lies?

A I'd probably like to get away with them but my mother won't let me. I tried a couple of times when I was a kid.

Q Now you touched upon another subject that I kind of want to turn to and that is you were talking about some of these red varieties get nice and red but they're hard as rocks when they're shipped. Let me change the subject a bit and—

A I'm reading this while you're talking. Here's something—the fourth time—here's this music, "when you [3901] bit into a big juicy peach that memories come to mind summer—the first time you danced with a girl, one fourth of July, or the last summer before you went to college"; does this mean that if you didn't go to college, you can't eat your peaches? I mean, here in the center in the world, what's this twenty percent of the world? Or the Americans go to college? And the rest of them—so



this is a guy working a punch press in Pittsburgh. Maybe it's very strong but I missed the point.

They seem not to really go out and—somebody in an advertising agency is selling them something that's not really doing me a bit of good. You know, as I pointed out, I'm selling into those terminal markets, which are selling into those small grocery stores in the inner city and what have you, and they're definitely not—if they're talking about a college graduate, they're definitely not targeting to the people that I want to target my produce to. I would think that most people who are non-college graduates and stuck behind a punch press the last three years, would resent the guy in the pin-striped suit with a necktie that comes walking through the plant telling him his hole's out of place.

Q Now do you think that color chips discriminate against the yellow varieties in favor of the red varieties?

A Yes.

[3902]

Q Why?

A Well, because in some of these things, they talk about, you know, red is better and not being that familiar with these things I can't just go through them. Here's a girl, the little girl in the wet T-shirt contest.

Q Looking at Exhibit 301?

A Yes.

(Pause.)

A I can't specifically find—but in that folder that shows the—in the red—and what have you—

Q Those Exhibits in those big advertising folders—

A Yes. And then they—

Q —in evidence?

A —send out weekly or monthly little sheets to the industry. And in there it talks about the red varieties.

Q Now I want to change the subject once again, Mr. Elliott, and talk about the size eliminations.

A The volume control?

Q Yes. With respect to—can you tell us about the size elimination and how that's affected your company?

A Well, to start with, they forced us not to sell a product that was saleable. Obviously, other states are selling, you know, smaller sizes than we're allowed to.

\* \* \* \* \*

[3909]

A Well, basically they're helping their competitors and I agree that I have no desire to help my competitors. In the bottom drawer of my desk is a faded yellow telegram that was sent to my father in about 1962 by—I can't remember the name of the group—but it was a—primarily a group of professional growers that got together and the price of plums at that point was hitting about two dollars, which back then was money losing pretty even point and this is the growers' demand you hold for a price of like two sixty-five, which is what they considered a break even. And so my father, who at that point was handling sales, held for two sixty-five while all the people in Fresno sold them for like two and a half and two twenty-five, underneath him.

So the lesson is, they don't care what happens to us.

Q Now you learn and you don't care what happens to them and—

A —cooperative effort and they just—went out of business. You read these Minutes from, you know, our alleged friends in the industry and because we filed this 15A, they discussed ways to put us out of business right there. Why should I care what happens to them? All right. I mean, I don't—we're not—we're not even selling to the same people. We have to be—grow the same commodity, but they're not interested in my welfare by any stretch of [3910] the imagination. I don't see any reason why I ought to be concerned about their's. You know, we're competitors.

In any other industry, if the competitors got together like they do in the tree fruit thing, you'd go to prison. I mean, I can use the paper industry as a prime example. What has happened there. If the President of General Motors got this in there and tried to fix the price of cars, what would happen?

Q Or generically advertise the price of cars?

A Yeah, buying cars—the Government forcing you to buy cars. It's not unlike the Fuller Brush man being required to come into your living room.

Q Periodically.

A And I might also, this is kind of a—this is a personal thing that upsets me about this whole program for years. The program was put in to be—the Marketing Order Programs were put into being by the same guy that sent that man to a concentration camp because he had slanted little eyes.

Q You mean Mr. Kashiki?

A Yeah. Had slanted little eyes; they throw him in a concentration camp. And a little bit after they came up with this whole program—in Eastern Europe, they're finding it doesn't work.

And here we are in a Courtroom in the United [3911] States, arguing about whether or not I have the right to grow a crop and sell it where I want to. And to me, that's ludicrous.

Q Without spending money to benefit your—

A And I'm being taxed by my competitors for trying to do it and then badmouthed by the same people who salaries I pay because I question it.

Q And the same people you're fighting with, judging whether or not a color chip with their eyeball meets the skin color they think is appropriate?

A Yes. Because—and you read the Minutes, you know, of Mr. Giannini arbitrarily changing the color chips because his crops weren't ready. You know, it's—the whole thing smacks of this, you know, what the people in Eastern Europe are trying to get away from. And it frankly upsets me that I'm forced to go through this.

Q Let's talk about Mr. Giannini and the Kingsburg growing area. Is that where most of his growing operations are?

A I think so; I'm not really that familiar with Giannini because I don't associate with him. We are a little family business out in the country; we stay away from everybody, like to mind our own business and I'm not really worried about what a lot of other people are doing. I don't know whose orchard is what. [3912]

Q Let's talk about in general. If I'm a grower of "x" variety of nectarines; do my nectarines get ready for harvest at the same time as every other growers who have that same variety?

A No. There's different growing areas in the San Joaquin Valley.

Q Can you explain that to me?



A Well, and example in the Cutler [illegible] area, where we exist, and—

Q How far away is that from this Courtroom?

A Thirty miles.

Q East?

A Southeast. There's an area there that things are a little earlier; that's where the Cūmmer (phonetic) tomato industry for years had a little niche. It's just not quite as cold there as it is further out into the valley.

Q South of here?

A Yes. And in this little—

Q Or Southwest of here?

A —it's kind of like a cove and our fruits a little earlier. Another place that we grow is west of Visalia. Now there's a large area east of Visalia, where Mr. Pinkham and his group reside. And my father and a couple of other people are the only ones that ever grew tree fruit down in this other area.

[3913]

Q In other words, Pinkham's group was on the east and your father's group was on the west?

A No, just the—yeah, my father—maybe another eighty or ninety acres. We don't necessarily grow—and our idea is to get the crop planted where it's early, get it off early, get it out; get it into the market place, and go on to the next one. And this is a little upsetting to people that have maybe some ground that is later and maybe produces heavier tonnage.

Q That's their business?

A Yeah. If what we were producing was not acceptable to the market, we wouldn't be in business. And everybody tries to develop their own market niche. All right? I mean, this is how the world of business is done. You don't try to go on head to head

with, you know, General Motors. You make something that they don't. Well, this has kind of been our attitude. We, again, don't care what they do. We have established our own little market niche. We want to maintain it and we want to be left alone. We don't need their help.

If, in the case of this advertising, if a bunch of them want to group together and advertise their overripe fruit and however they want to do it; that's fine. I have no problems with whatever association they want to form.

[3914]

An example of an association is Mr. Kashiki and Mr. Chang and myself forming an association to try and maintain our rights. You know, we'll join in when it's to our benefit, any association that we feel is beneficial to ourselves.

Q Voluntary and mandatory?

A Voluntary and not mandatory. And I don't have problems with people banding together to promote their mutual benefit. And I think there are provisions for that.

Q But you want to be—you don't want to involuntarily contribute to that?

A No. I don't want to help them pay for their sport. I mean—when we found out about the Tree Fruit Reserve giving I think it was sixty thousand dollars to the California Grape and Tree Fruit League, now this is where they're taking my tax money and giving it to Virgil Rasmussen's private club. I mean, the next thing they're going to do is they're going to give it to the Rotary Club and the Lion's Club and the Moose and the Elk and everybody else. That's all the Grape and Tree Fruit League is, is a private club of produce people.

Q Commercial?

A Yeah. And they're using my tax dollars—

Q Your assessment money?

A My tax; it's a tax, to promote their private [3915] club. I don't understand it.

MS. BOUTROUS: Objection, your Honor. I means that's a slight—you first said it was the Tree Fruit Reserve that did it and I don't know if he's switching now and he's saying it's his assessment money, but you know we would obviously disagree with that characterization.

BY MR. CAMPAGNE:

Q Do you disagree with that characterization?

A I sure do. I mean, when they raise the rent so they can give—and they say in the Minutes they're doing it.

JUDGE BAKER: With reference to the objection, the objection is overruled.

BY MR. CAMPAGNE:

Q Do you think Tree Fruit Reserve is spending your assessment money, Mr. Elliott?

A Sure.

Q Why?

A They in joint meetings, you look at the things, they raised the rent so they can have more money to give to the, you know, to their private club. They're one and the same thing. Anybody that can't see that has got to be blind and Jim Louis (phonetic) can see it.

Q And he's blind?

A And he's blind.

\* \* \* \* \*

UNITED STATES DEPARTMENT OF  
AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

AMA DOCKET No. F&V 916-3

AMA DOCKET No. F&V 917-4

IN THE MATTER OF: WILEMAN BROTHERS & ELLIOTT,  
INC., A CALIFORNIA CORPORATION AND KASH, INC.,  
A CALIFORNIA CORPORATION, PETITIONERS

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,  
RESPONDENT

[Excerpts from Testimony of Jonathan Field]

Fresno County Courthouse  
1100 Van Ness  
Fresno, California  
Tuesday, February 13, 1990

The above mentioned matter came on for hearing,  
before the Secretary of Agriculture, pursuant to  
Notice at 9:00 a.m.

Before: DOROTHEA A. BAKER, Administrative  
Law Judge

APPEARANCES:

For The Government:

GREGORY COOPER, Esq.  
Ms. HELEN BOUTROUS, Esq.  
U.S. Department of Agriculture  
Office of General Counsel  
Marketing Division  
14th & Independence Avenue  
Washington, D.C. 20250



[4034] And then we have the next group of three documents which are the same similarly documents but they are with regard to '88 harvest season, your Honor. So we'd like to mark them next in order as well. So 351 would be the "1988 Market Development Budget Five Million Five Hundred and Twenty Eight Thousand" is how it reads on the top. 352, Exhibit 352, is the pie chart, which reads "1988 Spot Markets and National Media" parens "(Radio and TV)". And Exhibit 353 is another what I call time chart with weeks of the bottom and percentage of money on the top, on the side, which reads at the top. "1988 Media Expense Charts". (The documents referred to were marked for purposes of identification as Petitioner's Exhibit Nos. 348, 349, 350, 351, 352, and 353.)

Whereupon,

#### JONATHAN FIELD

having been previously duly sworn, the witness resumed the stand, was examined and testified further as follows:

#### DIRECT EXAMINATION

BY MR. CAMPAGNE:

Q And Mr. Field, if we can talk about these right here in the middle so the Judge, she can look at them while you talk about them.

What I'd like to do is show you Mr. Field—well, first of all, Mr. Field, I think the record already [4035] reflects that these are the charts which you put together pursuant to the request that we have made on the record of Mr. Cooper and Ms. Boutrous pursuant to our request and Order for Production

number 45, I believe, don't hold me to the exact number, but to get some data regarding the advertising and promotion budget; is that correct?

A Yes, it is. I should also point out on some of the circular graphs they are—the percentages are right but it might not reflect—they're not accurate. I did not have a protractor when I did these.

Q You're saying your art —

A They're free hand.

Q Your art might not be perfect, yeah. So if we can go through these charts one at a time; maybe if you can turn your chair the way it is comfortable for you and then we'll place it here and Mr. Cooper and I can kind of look.

Let's, for the record, I think you're indicating we go by the numbers in the slices rather than the size of the slices.

A Right, correct.

Q Okay. Let's take them exhibit by exhibit. The first exhibit—the first exhibit I would like you to explain to us is Exhibit number 348 which, for the record, is captioned "1989 Market Development Budgeted Five Million Eighty Thousand Dollars". What does this Exhibit represent, [4036] Mr. Field?

A This is a representation of the total Market Development Budget in 1989.

Q Let me stop you one second. Does the word "Market Development" mean both advertising and promotion, all sorts of market development?

A Every market development activity as opposed to strictly advertising or strictly public relations or strictly food service, so it's all portions of the Market

Development program. That's not including—no export; export marketing would be separate. This is just our domestic, along with a bit in Canada.

Q So Canada is show here as if it was a domestic—your export would be a different—something different that's not included in any of these exhibits that we're talking about today?

A Right.

Q Okay. Is it far to say that it varies a little bit from year to year but approximately nine million dollars is collected in total assessments, of which approximately five to five and a half million is spent in various forms of market development?

A Yes. That's pretty close, yes.

Q Okay. And, okay, so this is the 1989, Exhibit 348, regarding Market Development for '89, correct?

[4037] A Correct.

Q Now can you explain for Mr. Cooper and myself and her Honor what the pie chart there is to represent?

A And I don't know if you've introduced it as an exhibit, but —

Q Well, yes —

A — but in some of the other exhibits—in some of the Minutes we will have a California Summer Fruits, the breakout by commodity, of the individual programs or promotion programs. I took those numbers, compared them to the total budgeted figure of a little over five million and so that is the total figure in each of the sections of the pie. For example —

Q Let's go through it section by section.

A Yeah.

Q Very slowly. For the record. But now let me just stop you for none second. We're looking at the section of the pie, which is what I would call the northeast quadrant of the pie, and what does that say? Can you just read what's written in that quadrant?

A The total—that quadrant is, "The National Network and Cable TV and Production" production being what it cost you to run—the fees that you pay for actors and actresses and music that you have to pay.

Q Then it says twenty-eight percent underneath [4038] that.

A That total is one million four hundred and forty-one thousand was budgeted; one million four hundred and forty on thousand compared to the five million dollars is roughly twenty-eight percent. So twenty-eight percent of the our budget went into National Network Cable TV and Production.

Q So that, again, this is with regard to the domestic market development budget?

A Right.

Q Okay. And can you go then to the southeast quadrant, immediately below that, and read it to us and tell us what it represents?

A The next quadrant is the "National Network and Spot Radio" so that would be our radio, which is highlighted. The top one had TV highlighted; on the next one we have radio highlighted.



Q Okay. For the record, I'll circle the TV, the word, in the northeast quadrant and I'll circle a radio word in the southeast quadrant, because the yellow may not come through on the xerox machine.

A The total we spent on radio was one million one hundred and fifty-nine thousand. And that divided by the five million eighty thousand gives you a twenty-three percent of our budget went into our radio, total radio [4039] program. Beneath that figure, we did have some spot market radio and I listed the spot markets for radio; Boston, Chicago, Dallas, San Francisco and Washington, DC.

Q And then it says to the right of it, approximately two hundred and sixty thousand dollars.

A I think that's the—oh, two sixty, yeah; approximately two hundred and sixty thousand of the one million one hundred and fifty-nine thousand, was devoted as extra into these particular spot markets. So Boston, Chicago, Dallas, San Francisco, Washington, got a little more than their share because of the extra advertising in the amount of two hundred and sixty thousand.

Q Now you've used some words in the northeast quadrant, on the southeast quadrant of this pie on Exhibit 348, that I would just like to have you elaborate on. And is that, let's look at the northeast quadrant of the pie. You're talking about National Network and, there's a little "and" sign, and Cable TV and production. I take it these are like CBS, NBC and ABC national broadcasting stations, as well as cable advertising dollars, where the cable plays nationally, throughout the domestic market.

A Cable, such as the Turner Broadcasting station, and that would be kind of an example; the national cable programming.

Q Rather than a small town, local cable?

[4040] A And rather than your local station; you might have a local KDIE in Sacramento, Channel 6, is the educational channel, but it is only a Sacramento channel.

Q Okay. So these are the type of advertisements in the northeast quadrants that would run either on a network television station or a cable television station that is broadcast throughout the domestic community of the United States of America including Canada?

A Yes. It —

Q Now below—

A —would overlap into Canada but it is not specifically directed to Canada. There's a little bit of money in our Canadian promotion program which is more specifically directed toward Canada.

Q I see. Now turning your attention to the southeast quadrant on the chart. At the top part you refer to total expenditures of approximately one million one hundred and fifty-nine thousand dollars for National Network and Spot Radio. Now, again, the word "National Network Radio" Versus "Spot Radio", is that the same sort of distinction? You've got radio channels that are like CBS radio, NBC radio, ABC radio versus spot radios which are just your little local stations; is that it?

A Yes. A good example would be like Paul Harvey. You're listening to your local station and

they [4041] might have a national affiliate and all of a sudden you hear the Paul Harvey section, which is a nationally— national program, so that's how—and that'll be kind of our national network, would be—pick up on all of the networks that are affiliated with a national network.

Q Okay. And so, therefore, whereas sometimes, because I represent some TV stations, we use the word "spots" to just mean either a local or a national advertising spot on the station, you know, fill in an advertisement. You, in your business, you use the business "spot" to be a "spot market", in other words, a local—

A Strategic market area.

Q Yes.

A In which they can break out and advertise with an additional emphasis on that particular market, such as stations which you may get only in Los Angeles.

Q That would be a spot—

A Los Angeles would be a spot market, so that strategic are becomes a spot market as opposed to what you're considering as a spot, being the thirty second segment that's available to sell to an advertiser by your radio station.

Q Either on a national or a local station?

A Right.

Q Okay. Good. Let's kind of keep going [4042] clockwise now. So that would then be the southwest quadrant, continuing in a clockwise direction, which

says, "merchandising twenty-three percent" and then it has some other words.

A Merchandising has a total budget of approximately one point one five five million dollars; that would include our field staff activities, the incentive programs, the contest programs, retail center projects, retail projects which are special projects with retail, and our point of sale material, which is supplied. And so the total budget for those activities is one point one five five million, which comprises of about twenty-three percent of the total budget.

Q And by point of sales, you've abbreviated that as "POS"?

A Yes.

Q Okay. And can we continue going clockwise to the next one which says, "Publicity and Education, five point five percent"?

A Right.

Q That publicity and education totals approximately two hundred and eighty thousand dollars, which is approximately five point five percent. Those would be our activities with food editors, encouraging them to write these major releases that you see on your food page ads, [4043] using our photographs and some of our material. Also work with the Department of Extension; it's a non paid for advertising, which a lot of newspapers and magazines will use when you read an article—recipe development of a magazine. The magazines don't develop them; usually it's from an organization such as ours.

Q I see. And continuing clockwise, again, the next one says "Canada six percent".



A The Canadian program is—we're on a cooperative basis with the State of California on our export market development program, so that is one of the reasons it is broken out specifically. And that includes some French and English advertisements in the major markets, Toronto, Montreal, Vancouver. The three major markets in Canada.

Q Those are about three hundred thousand bucks?

A Yeah. There's about three hundred thousand dollars for that. It includes basically an overlap of their point of sale material, some French material, also some PR work; a lot of work with the Canadian wholesalers as far as their conventions.

Q Is that so that the scripts or the television scripts and the radio scripts that we have in evidence would be basically the identical scripts but they would be in the French language?

A Yeah, they're pretty close. I'm not—I [4044] don't speak French but they told me they're—

Q They're about as close a translation as you could do in the French language, I take it?

A Yes. And those are in the Montreal—because Montreal and Quebec are a French-speaking area.

Q I understand. And the next one in the clockwise directions says, I think it says "Trade, five percent".

A Trade activities include direct promotions such as those inserts in the packer, an advertising promotion guide which we send out to retailers to let them know what kind of a program that we're going to have in place during our coming season; attending

some of the trade shows, PMB, United, which Mr. Elliott talked about earlier on, and those are all included in that trade package, as far as our trade awareness package, or trade awareness section of our Market Development Program.

Q So it's going to various—it's written materials given out say, as inserts, like Mr. Parker testified about the inserts in the packer newspaper or inserts into various trade papers and actually going to various trade shows; that type of thing?

A Yes.

Q That's the five percent, two hundred and forty thousand dollar figure? Okay, and then the last one?

[4045] A Okay. The last one, you can see how my graphic have kind of fallen apart; as you see, it's nearly three times as big as trade and it's much smaller percent.

Q So what you're saying is the size of the pie that you've drawn on this chart is just free hand, and it doesn't actually reflect the percentage? We should be looking at the numbers?

A The numbers are accurate but the actual configuration is, obviously, off.

Q Yes. And the last slice of the pie, so to speak, reads "Research, two percent"—I can't read—

A "Food service, two point five percent".

Q That's an "F", the first letter is an "F", okay. I'm going to write over that a little bit. Food Service, two point five percent.

A Yes. Two point five percent.

Q I'm going to make the point a little darker. And then miscellaneous, two-percent—

A A lot of the miscellaneous is the—some of the photography that we do, like for during the 1989 season, if we're doing photography for new materials for the 1990—we have to do them during '89. You wouldn't have fruit available if you waited until 1990 to do it.

Q I see.

A The turn around time would be too short; we're [4046] just not able to do that. So that's some program development that the money would be included in "miscellaneous".

Q So "miscellaneous food service and research" adds up to about nine point five percent. And that would be of the five million eighty thousand dollar figure?

A Yes.

Q Okay. That concludes—oh, there was one notation you had made on the chart; you have a little asterisk or footnote alongside the word "miscellaneous" in the last quadrant we talked about. And there's a little footnote at the bottom. And it just says, "See note number 1; artwork has not improve". What do you mean by that?

A I think when the first—it refers back to 351. The note on the bottom of your Exhibit 351, the asterisk, not proportionate to the pie chart.

Q Oh, okay.

A That's all that means; I was trying to explain that these are not proportional.

Q Okay. So the little footnote was there just to remind us that these pie charts aren't—aren't proportional to the percentages being discussed within the pie chart?

A Right. And the asterisk is consistent—because the 351 and 348 are different numbers but fairly [4047] much the same chart.

Q I see. That makes sense. Let's put that one there so we don't get confused with that one.

Let's turn this one down so we don't get confused and then go the next 1989 Exhibit, which is Exhibit 349, that we tagged in the right hand corner.

This appears to be a different pie chart and this pie chart, again, it seems to have on, two, three, four, time zone quadrants. And then there's little sub-quadrants within that. Now can you take us through the major types of quadrants first?

A Exhibit 349 is the 1989 Spot Radio Markets and National Media. And the assumption you have to make is with a national program is that it's pretty much very similar to the population or the demographics of the U.S.

Q Let me interrupt you one second. And I just want to make the record clear, again, with respect to Exhibit 349, I'm now looking at the top of Exhibit 348, where you've put the 1989 Market Development—I should say, Domestic Market Development is budgeted five million eighty thousand dollars; is it fair to say that Exhibit 349 is just another way of looking at how the money was spent?

A Only the portions that you've talked about being in the northeast quadrant and southeast quadrant. The rest of the money is—



[4048] Q Is not—

A —on a different, you know, basically we've looked at them as national programs so they're spent nationally, except for Canada.

Q The point I'm trying to make is that, is it fair to say—is it fair to say that the right half of the pie that's shown on Exhibit 348, only the right half, that is your television and radio expenditures, are exhibited on 349?

A Yes.

Q Okay.

A You get by implication there are things that—or by inference, you could use the data on 349 and come up with the answer—with the rest of the chart but it's specific to those two areas.

Q Okay

A That's what I thought you were requesting.

Q Exactly. Now I understand that you've broken down the TV and radio monies by time zone, as I requested, in these four major quadrants?

A Basically the national program are going to go where the population is. So these are just broken up into the time zones. Obviously, there is more population on the East Coast than there is in the South area, so because there's more people in that area there are more radio [4049] stations, there's more opportunity for them to hear. They have more people to hear those spots and it cost you more money based on the number of people who happen to hear a particular spot.

Q So is the—when you say and I'll call it the right hand quadrant of the pie—

A We're just talking about now, the big black numbers on this; I'm just talking about the big black numbers.

Q So where its says, "fifty-three percent East Coast", "twenty-six percent Central", "three percent Mountain" and eighteen percent, West Coast", those are the four quadrants we're talking about?

A Basically, yes.

Q Okay. Now we're talking about percentage of money, again, here aren't we?

A Yes.

Q And that would be—

A We're talking—

Q —money that was spent and referred to in the Northeast and Southeast quadrant of Exhibit 348? In other words, if we added the one million four hundred and forty one thousand dollars from the Northeast quadrant of Exhibit 348 to the one million one hundred and forty-nine thousand—one million one hundred and fifty nine thousand dollars [4050] of the Southeast quadrant of Exhibit 348, that TV time and radio time was then spent in these approximate percentages in the East, Central, Mountain and West Coast time zones as shown on Exhibit 349? Am I understanding that correctly?

A Not exactly. For example, fifty-three percent is on the East Coast, based on population.

Q That's on Exhibit 349?

A On 349, fifty-three percent. So if you would look at our national network and cable, all of our TV in 1989 was national. So from it, you could infer that fifty-three percent of the one point four million dollars is approximately how much money was earmarked into the East Coast for national media programs. You could, by the same token if you went on the radio, you could take this fifty-three percent times—you'd have to take the total radio spot, network radio, one million one hundred and fifty-nine thousand dollars, deduct that that was specifically for spot, because spot is indicated differently on 349, and so you take that, you'd have roughly nine hundred thousand times the fifty-three percent, so that would give you how much was spent in that particular market.

Q Okay. SO the major quadrants then of fifty-three percent East Coast, twenty-six percent Central, three percent Mountain, and eighteen percent West Coast, as shown on 349 Exhibit number, do not include the very small spot [4051] market entry on the bottom southeast quadrant of Exhibit 348? Those are shown separately on Exhibit 349?

A Right

Q Okay.

A This is where it becomes a bit more confusing. On 349 we were in spot market radio in Boston, Chicago, Dallas, San Francisco and Washington, DC. Those particular markets, San Francisco, Boston, Washington, Dallas and Chicago, the numbers indicated in their section of the pie is their proportionate share of the U.S. population. Intuitively, if you look at 49—

Q 349

A I mean, 349. To look at this table intuitively, you can see that we had additional—additional advertising on the East Coast in these two markets, which is in the East Coast Boston and Washington, DC, which means that you actually end up with more dollars because you did more work in those particular markets.

Q Because you gave them a little particular spot here?

A You gave them a little kick with some spot radio.

Q Okay.

A The same thing in the West Coast. We had a little in the San Francisco Bay Area because our statistics [4052] and some of the studies have shown that that's a good market for our product so we give a little and the population is there, so we gave an extra kick there.

If you wanted to determine how much of this two hundred and sixty thousand dollars was spent in each of those spot markets, then the way—you would accumulate the percentage of the population in each of these areas, say the percentage is going to be a relative number, take the San Francisco Bay Area, Boston, Washington, Chicago and Dallas, and you end up with roughly nine point four percent of the population. You divided by the individual, you can say, well approximately ten to fifteen percent was in the Bay Area, ten to fifteen percent in Boston, twenty to twenty-five percent in Washington, DC, of the two hundred and sixty thousand. Twenty to twenty-five percent in Chicago, and ten to fifteen percent in



Dallas, Fort Worth of that two hundred and sixty thousand.

That would then allow you to come up with a specific figure and then you could calculate roughly the exact amount of money that went into those particular large areas, East Coast, West Coast.

Q I see, you would just do a proration of those little spots that are shown—

A Yes.

Q —against a spot market of two hundred and [4053] sixty thousand that's shown on Exhibit 348?

A Yes. I would have done that; I ran out of time.

Q That's all right.

A But it can be accomplished.

Q Yeah, that's understandable; thank you. Let me turn to the next one, then, which I understand is our last chart for the 1989 harvest season, which is marked as Exhibit 350, what I called the time chart. And it says at the top, for the record, "1989 Percent of Budget By Item and Timing". And can you explain this graph, please?

A One of the problems with this graph is that I was requested to do it on a percentage basis; well, a hundred percent of a small number, if you look at the hundred percent looks like a lot—a hundred percent of five thousand dollars is five thousand; whereas ten percent of a million is a hundred thousand. Now some people would rather have a hundred percent of something; I would rather have ten percent—

Q Of a larger—

A Of the larger number. So the numbers here are distorted.

Q That's why you wrote in the numbers beside?

A So then what I did along the top of things was to—I added some numbers to—so it would not be [4054] distorted or provided the numbers so someone could figure out exactly. And as a good example of that—

Q Well, first of all, just for the record, just to go through the steps. I take it, the bottom has some numbers and those are weeks?

A The bottom is the weeks; we have an eighteen week radio program.

Q So it goes for radio and television?

A Radio and television but our radio program is constant for the eighteen week and so the TV or spot radio, you can see what weeks that we ran spot radio or spot TV and what time period we would use to increase the amounts of advertising. But our total program is eighteen weeks.

Q I see.

A Our total media program is eighteen weeks.

Q Or at least was in that particular season, starting with May 22nd?

A Yeah. And you'll find it was the same in the following year.

Q I see.

A Or the preceding year also; eighteen weeks.

Q Again, just so the record is real clear, I think you've probably said it once already but just to make

sure that we're understanding this correctly, if I look at Exhibit 348 and I look at Exhibit 350, you are only graphing [4055] on Exhibit 350 the expenditures of the Northeast and Southeast quadrants of Exhibit 348.

In other words, you are only graphing on Exhibit 350, the monies spent on TV and radio market development, rather than the monies spent on other types of domestic market development?

A That's true.

Q Thank you. Now can you please proceed with your explanation of Exhibit 350?

A This also will explain some of the reasons on our percentage. The national network radio runs the complete eighteen weeks but our research has shown that the earlier a buyer starts, the more opportunities they will have during the season and the more purchases they will make.

Q Excuse me. Time out one second. Can you show her Honor and I and Mr. Cooper how, by looking at this chart, we can see that the radio ran for the full eighteen weeks? I notice you have little boxes here and yellow markings?

A Radio and then radio.

Q Okay. Just so I can describe it for the record, if we look at the bottom left hand—I'm sorry. If we look at Exhibit 350, on its southwest corner of the graph, you see a little box where you've marked the word [4056] "radio" in yellow. And then if we look to the southeast box, you've also marked in a "radio" trying to show us that radio advertisements ran the full length of the eighteen weeks?

A Yes.

Q And why are those in two separate boxes? You have a southwest box marked "radio" and you have a southeast box marked "radio"?

A The comments made in the first radio box says, "radio eighteen weeks, a hundred and fifty points per week" and a hundred and fifty points per week has to do with how many times you reach a person in a target market audience in the market. So the more the points, the more obnoxious the ads become, the more times you have to hear them. And there are some that have the—I think the—some of the radio ads that you hear every morning, and they're probably cute for a week and then they get old. We hope we don't get to that level but that's what these points mean. And so what we're saying here is —

Q It's an advertisement point system?

A Yes. It's what they call rating points; gross rating points. It has to do with the number of—the number or people you reach and the number of times you reach them.

Q I see.

[4057] A In our target market audience.

Q Okay.

A Approximately ten percent per week of the radio budget goes into the first six weeks of the season, which I've got ten percent per week, which is approximately on a national radio during that year, was approximately ninety thousand dollars per week.

Q Okay. Let me—yeah, let me—after the ninety, let me put a comma and three zeroes; they didn't come through. Let me make them a little darker. Let me put a point zero zero for the cents. So you're



referring to ninety thousand dollars a week being spent for eighteen weeks?

A No. For the first six weeks to purchase these hundred and fifty points. See this—if you notice the line, it only goes over to right opposite the—that says six weeks.

Q Oh, I see. So let me just kind of circle the six weeks on to that line. So it's ninety thousand dollars a week for those radio spots for six weeks?

A And after those six weeks have been completed on their national radio, we reduce the coverage to fifty points per week, the same kind of ads. We do change the ads, but basically now we go down to fifty points per week.

Q You run them a little less often?

[4058] A Less often. It might not specifically equate to a third, but it would be—I mean, that gives you an idea.

Q I see.

A And that works out for the remaining of about three to four percent per week of the total budget. So we spend approximately forty thousand dollars per week from week six through week eight—or the end of week six or the day beginning week seven through the end of week eighteen.

Q Okay. And I'll circle the week eighteen onto the last line of that box to indicate what you've just said.

A That'll be national network radio.

Q National radio? Okay.

A Now the next part of the graph is basically—is the—see where it goes from ten percent to the twenty-five percent.

Q That's because the ten percent is what you're saying is basically spent on radio?

A Of the radio budget? It was trying to put everything on one table.

Q Yes.

A And when I get to the final, I think the final—once we get through that, I will—the figures up here that are the most significant are along the top—

Q Yes.

[4059] A—and I'll explain those. Okay, the next thing on our National Radio which we started at the very beginning was Network TV. We had six weeks of that beginning with the first week, May 22nd and going through the end of the six week period. A hundred and twenty five points per week, approximately fifteen to eighteen percent of the budget per week, which is roughly—it's an expenditure of two hundred thousand dollars per week beginning with the first through the six weeks. And that went on for six weeks.

Q I see. And then it—did it continue—did network TV continue after the six weeks or it just died then?

A National Network TV, instead of being on the major stations, then shifted from the end of the six weeks, week seven through week fifteen, to a cable TV national programming.

Q With your permission then, I'll draw a little arrow—I'll draw a little arrow proceeding from the

national TV box that ends in week six into the cable TV that begins at week seven?

A Yes.

[4060] Q Okay. And I'll draw the similar arrow from the radio that you've just been talking about so that the boxes will flow?

A Okay. And that lasts until the end of the fifteenth week.

Q Okay. So on cable television, if I'm understanding your system here, at the beginning of the seventh week and ending on the fifteenth—at the end of the fifteenth week, or the beginning of the sixteenth week, in other words, you're spending about twenty-one thousand dollars a week?

A Yes.

Q Okay. I guess that takes us up to about twenty-five percent through thirty percent, which you've marked as cable TV.

A We also had cable going during the same time we had our national network. So our total TV, you might want to bracket here, Tom, just put a bracket like this, total TV —

Q Okay. Let me have you do that, so it's done right.

A I think that's — and I'm marking on the left side, all TV, I've bracketed "cable TV and network TV" together so that you can see that TV is the next cornerstone of the program.

Q I see.

A During the same first six week period, our cable TV was run at fifty points per week at roughly

twenty-[4061] one thousand dollars per week for six weeks. That level stayed—actually the level was constant during our full fifteen week period. What we eliminated was national network TV, which is only for that first six week block.

Q I see. Okay. And then going up the percentage chart, again, from thirty to forty of forty-two or three, whatever that line's at, I see another box. What does that represent? I can't read that.

A The next—the next—actually it's—the other line kind of distorts that — the next real block is for our spot radio program.

Q Okay. Let me—

A Let me draw the arrow from this spot radio to this spot radio and then down to this spot radio.

Q Yeah. And would like to bracket this area here then as all being spot radio?

A I'm going to circle the first spot radio if that's all right.

Q Yeah.

A I'll circle spot radio and it's all highlighted as spot radio.

Q Okay.

A So that's the first one and then I'm going to put an arrow from the first one that lasted for three weeks, so then the next three week period, spot radio went for [4062] another three week period and then I'm going to draw an arrow down to the third three week period of spot radio, for a total of nine weeks of spot radio.



Q Okay. And why did you take the spot radio and put them in these three separate boxes like that?

A The emphasis on the program, again, is the heavy upfront, that people in the market is buying early on.

Q I see.

A So you emphasize that it's available; it's here; it's summer again; let's you know by fruit.

Q Let me see if I understand the chart then. For the first three weeks of the program from May 22nd, for the first three weeks, you're spending about fifty-two thousand a week in spot radio and from about the third week to the sixth week, you're spending about twenty-six thousand dollars a week.

A Roughly half as much as spot radio.

Q And it drops down again from the sixth week through the eighth week, through—

A For about twenty-one thousand a week. It drops down a little bit, yes.

Q Then the spot radio stops?

A Yes.

Q Okay. And then what is the next lines above the fifty mark there?

[4063] A Each of the basic promotion periods, which are—in this particular graph you have a period of where you're doing, you change things after three weeks. The first three weeks you've got a heavy spot radio, heavy cable TV, heavy network TV and heavy radio advertising during that three week period.

Approximately forty-two percent of our budget would be spent during that three week period. And that's the top number on the table.

Q That's a two—

A Forty-two.

Q Okay. I'll circle the forty-two there. And, again, just to make the record clear, I don't mean to keep you repeating it, but that would be forty-two percent within three weeks, starting May 22nd, as shown on Exhibit 350, of the total monies spent on the right half of the pie on Exhibit 348?

A Yes, that's true.

Q Thank you.

A And then the next three week period, the end of week three until the end of week six, in that particular period we have a reduced spot radio for that three week period. We reduced the amount of spot radio; we still have cable TV; we still have national network TV and we still have national radio. So although it's a reduced spot radio, [4064] we still have the full components of the program. During that time period we spend approximately thirty-eight percent of the budget.

Q Okay. Let me circle the thirty-eight. And then I take it that you've—on the next line you've added forty-two and thirty-eight and you've come up with eighty percent.

A Yes.

Q And I'll circle that eighty percent.

A Which says that during the first six weeks of the program, we've now spent eighty percent of our media budget.

Q Okay.

A During the next—

Q Is media budget another word for—that I keep referring to as the Northeast?

A Radio and TV.

Q —and Southeast quadrants on Exhibit 348?

A Media is commonly radio and TV. But it could also be magazine ads.

Q But when you say "media" you're talking about broadcast media?

A Yes.

Q And television and radio?

A Yes.

[4065] Q I see. Okay.

A During the next period which is week six to week eight, we had a two week flight of spot radio; we then had a—we still had our cable TV, but we started on our reduced network radio program. During that particular period, we spent about six point three percent of the budget.

Q And I'll circle the six point three again. And I take it, on the cumulative line, you're now up to eighty-six point three percent and we have the word "cumulative" there again. And I'll circle the eighty-six point three. I take it that's getting us to week eight?

A Yes.

Q That eighty-six point three percent? And I'll make the point on the point three of the eighty-six point three a little darker.

A Then from the end of week eight through the end of week fifteen, where we only have cable TV and national network at the reduced rate, we spent approximately thirteen percent of our budget.

Q Oh, that's a three, okay? Yeah.

A Eighty-six and—

Q Okay. Let me make the three a little clearer, so it doesn't look like an eight. And then I'll circle the thirteen. And then, again, cumulatively we come up to [4066] ninety-nine percent. Now I'll circle the ninety-nine percent.

A The numbers ought to be considered guides. It could be thirty percent or forty percent or forty-five and thirty-five, but it should be a guide to show pretty much how the spending occurs. Then the last remaining part of our—is the approximately one percent, which goes up to the end of the eighteen week period. Approximately one percent in that last period of week sixteen, seventeen and eighteen, that last three week period, which will then give you the hundred percent of your budget.

Q Which is your cumulative amount?

A Yes. And also I have listed on the upper right hand corner of this table how much was spent; network radio, approximately nine hundred thousand; spot radio, approximately two hundred and sixty thousand; cable TV, approximately three hundred thousand; network TV, approximately one point one million. So that's how you can from those figures



come up with my weekly figures or check with my weekly figures.

Q Okay. Let me put those in a separate box so they can kind of stand out. And, again, these figures you've just read here, that was the radio spot, radio and cable TV, and network TV; those, again, are domestic expenditures?

A Yes.

MR. CAMPAGNE: Your Honor, did you have any questions of Mr. Field regarding 348, 349 or 350, before I turn to the next three regarding the prior season?

JUDGE BAKER: Thank you, no. It's quite clear.

MR. CAMPAGNE: Okay. Mr. Field, let's take those one at a time. I'll stack these in little stacks so we don't get them confused.

BY MR. CAMPAGNE:

Q It's my understanding that you used exactly the same system for the next three exhibits which are Exhibits 351, 352, and 353, regarding the 1988 Market Development.

[4067] A Yes.

Q The same system as you used for exhibits 348, 349, and 350, which were the three exhibits regarding the 1989 Market Development?

A Yes. So they should be statistically comparable and the numbers are comparable.

Q So basically the charts are on the same methodology?

A I used the same can lid to draw a circle.

\* \* \* \* \*

[4071] their radio spots, almost all the radio and TV spots for peaches, plums and nectarines have already been spent?

A The heavy money has been spent, yes.

Q For example, I'm looking at Exhibit 353 and it looks like eighty-six points five percent has already been spent anyway. And that's what you saw—

A Of the media budget, yes.

Q Yes, of the media budget. And that's why you saw no reason to carve out the pears because this really doesn't overlap.

A I didn't feel it would distort the relative numbers, knock a point off here and there.

Q Okay. Oh, there was one question, I'm sorry, I wanted to go back because we roughly looked at it before.

On the '89 Market Development Exhibit regarding—Exhibit number 349, where you've got these spot inclusions for Boston, Washington DC, San Francisco Bay Area, Dallas, Fort Worth and Chicago, were those just radio spots?

A Just radio.

Q Okay. So with your permission, I'll just put a little R by each one of those, or a little r-a-d-i-o, radio.

A It's also—it also mentions that on the other table.

[4072] Q So it will—I just wanted it to jive with that— with that table because I notice for harvest

season '88, you had written radio and TV there, so I thought I would make it consistent by adding the word "radio".

All right. So for the record, I've added the little word "radio" by Mr. Field's spot inclusions on Exhibit 349, so to match up with the Southeast quadrant of Exhibit 348. Okay. We'll put aside the Exhibits 348, 349 and 350, regarding 1989 Market Development Budget and get you back to where we were and that is the 1988 Market Development, three charts of Exhibits 351, 352 and 353.

Again, can you take us through these chart by chart, understanding that you can go a little bit quicker because I think we've got a little understanding of your system on that we've done it once for '89.

This is Exhibit 351 in front of you now and it says, "1988 Market Development Budget Five Million Five Hundred and Twenty-eight Thousand Dollars". And, again, I take it that that's the domestic market development program?

A Yes. The upper right hand quadrant of the Northeast quadrant, as Tom referred to before; total spent, TV highlighted, total spent two point four million divided by the five point five million, roughly forty-three percent of the budget was in all the TV programs, and TV advertising effort.

[4073] Q This would be both spot TV—

A Right.

Q —or what you would call local spot TV and national network TV, including cable?

A Yes.

Q Okay. Let me write the little word including cable.

A I'm not sure if we had cable at that time.

Q Oh, all right. I won't add it then, if you're not sure. But it does include the production costs, the filming costs?

A The production is the royalties you pay for the performers every time it runs.

Q Okay.

A Every time you run an ad you have to pay the performers a royalty for being part of that ad.

Q It's what some people would call script fees?

A I guess.

Q Or after fees for the union.

A Residuals, I think.

Q They're after residual fees.

A In the TV for 1988, if you compared this to the 1989, we were involved in spot television markets.

Q Okay. Now just to make the record clear, in the—on the Northeast quadrant where it says "TV forty-[4074] three percent", you've shown us that the TV budget of forty-three percent was approximately two point four million, but it's two million three hundred eighty-five thousand dollars. And then you've got a little notation underneath that, that of that the spot markets were —

A The listing of the spot markets—

Q Okay.



A Then the cumulative total of those spot markets was roughly two million one hundred and eighty thousand.

Q Okay. Let me make the one a little darker since it doesn't look like it's going to show up when it's xeroxed. So two million one hundred eighty thousand [4075] dollars of the two million three hundred eighty-five thousand dollar TV budget was spot markets?

A Yes. Devoted to these specific markets.

Q Those specific towns or areas or markets? Boston, Chicago, Fresno, Los Angeles, Minneapolis, New York, Sacramento, San Francisco and Washington, DC?

A Yes.

Q And I'll make the dollar sign a little darker because it doesn't look like it might—so it will come out when we xerox it.

Okay. With your permission then, I'll kind of circle the two million one hundred and eighty thousand dollars; make the brackets a little higher so it shows that it's referring to the spot market. And that's out of the two point four million figure?

A Right.

Q Now let's go clockwise again to the next one.

A Following in the same order, the next one is our radio.

Q And this would be both national and local spot radio?

A Yes.

Q Being twenty percent.

A Total spent, one point one million; one million, one hundred and fifteen thousand is the total spent on radio markets, which comprised approximately twenty percent of our project. We also had spot radio. We spent about two hundred and fifty thousand dollars in the spot radio markets of Boston, Chicago, Dallas, Los Angeles, and New York and San Francisco.

Q Okay. Again, if you allow me to bracket that, so it will match the prior quadrant. And I take it, that was—that two hundred and fifty thousand dollars is out of the one million one hundred and fifteen thousand?

A Yes.

Q I see, yes. Next quadrant, please.

A Merchandising similar to before; approximately [4076] one million seventy thousand for merchandising, comprising about nineteen percent of the budget.

Q Okay. And then what did you—what were you intending to mean by the "including" language there, the same as the prior chart?

A Same as in the prior chart; field staff, incentive, no contest contest program, retail projects and point of sale.

Q P-O-S?

A Yes, P-O-S-

Q And that what you mean by the "includes" I'll draw a little arrow; you're giving a definition to the word "merchandising"?

A Yes.

Q I see. Next quadrant please?

A The Canadian program which was similar to the prior year, two hundred and seventy thousand dollars, five percent.

Q Okay. Next quadrant, please.

A Trade activities. Again, the inserts and direct mailings to retail trade, to the trade factors; two hundred and fifteen thousand dollars, approximately four percent.

Q Okay. I'm going to circle the four, Mr. Field, because the percent sign almost looks like a forty, so [4077] I'm going to just circle the four and make the percent sign kind of tie up.

A The public relations and education activities, two hundred and twenty-five thousand, approximately four percent.

Q Okay. I'll circle the four of that PR or public relations column, so that the four doesn't look like a forty.

A Miscellaneous, research one percent; food service, two percent and then just the miscellaneous which is future year development photographs about two percent. So that totals approximately five percent for those

Q Thank you very much. Let me turn your attention then to the next chart in order, which is Exhibit 252 (sic) and, for the record, I understand that the number 252 was done in a manner similar to Exhibit—

JUDGE BAKER: 352.

MR. CAMPAGNE: I'm sorry.

BY MR. CAMPAGNE:

Q I understand that Exhibit 352, which I've just placed in front of you regarding '88, is similarly done as was 349 with respect to '89?

A Yes, very similar. It was done in the same manner.

Q Okay. Can you quickly take us through this [4078] one?

A The national—

Q And "by this one" I'm referring to 352.

A 352, the numbers, the big black numbers are for the national media program, network radio, network TV.

Q Time out; one second. So just for the record, I know it's probably obvious, but just to make it clear, if I look at Exhibit 351 and I look at the Northeast quadrant regarding TV, forty-three percent, and I look at the southerly quadrant which is radio, twenty percent; it's just those two quadrants which are being divided up and divided on Exhibit 352?

A Yes.

Q Okay. Please continue. I'm sorry.

A And then if you notice in the 1988 program we had a much stronger spot market program. We had more spot markets in both TV and radio. The spot markets are indicated with the percentages in high brackets by area, West Coast or East Coast et cetera. There's also like San Francisco Bay Area in brackets has TV dash R, that was both the TV and radio market. Sacramento, Fresno Area, TV; that was TV only. Dallas, Fort Worth has an R, so it is a radio



market only. To come up with some actual applied figures, if you wanted to, for example on the East Coast, if you took fifty-three percent figure as a national network program of [4079] TV, which would be two point three eight five million, less the two point one eight zero spot, so approximately two hundred thousand dollars, fifty-three percent or a hundred thousand dollars was spent on the East Coast for national network TV.

Q And you could do the same thing for the next quadrant on Exhibit 351 with respect to the radio?

A Fifty-three percent of one million one hundred and fifteen thousand, less two hundred and fifty thousand, approximately nine hundred thousand dollars was spent on radio. So that would be approximately four hundred thousand dollars?

Q In the East Coast quadrant?

A In the East Coast quadrant.

Q Basically the same set-up as you've done with the '89 charts?

A Yes. Then if you wanted to take these, as you said before, take the spot markets and use those as a proportion times the spot market numbers for radio and for TV—

Q Which are the little brackets on Exhibit 351?

A 351, and then you could then allocate and come up with a dollar figure number to apply.

Q To those spots?

A Which would give you a total figure spent on [4080] the East Coast.

Q Okay. So for example, I would add up all the little spots, if I wanted to do Washington, DC, Baltimore, divide that into two point four, get a proportion, the other way and get a proportion and then figure out that against the spot market, two point one eight million for TV and two hundred and fifty thousand for—oh, that was just the TV on—

A Yeah, that was the TV on the market—

Q Okay. That would be just against the TV side.

A Ultimately, you would get the dollar figure minus ten. And those are kind of time zone qualities too. So if you would want to follow what we—it was almost by time zones.

Q Okay. Let's go to the last exhibit, which is what I call a time chart, again. I understand that this Exhibit, number 353, which I'm now putting in front of you, which is captioned, "1988 Media Expenditures" is, again, just domestic expenditures. And, again, I understand that what you've done on Exhibit 353, is you've taken the TV, forty-three percent quadrant, and the radio twenty percent quadrant, from Exhibit 351, and you've time spread it on Exhibit 353.

A Yes.

Q In other words, Exhibit 353 with respect to [4081] 1988 is similar to or the same as what you've done with respect to Exhibit 350 regarding 1989?

A Yes.

Q Okay. Let's—

A Do you want to go a little quicker on this one?

Q Yes.

A The significant difference is, we started with the radio expenditure during the first week, radio only, no TV and that lasted for the first week.

Q Now the first—your season started a little earlier, I guess.

A Earlier season.

Q You've got the date May 16 there?

A Yes.

Q Okay. So your season started a little earlier. And you, and for the first week of the season, you only did some radio expenditures and that two point five percent of the expenditures?

A Yes.

Q Okay.

A And then we came on following that, we had a three week radio—we had continued with our national radio, which we've talked about before.

Q Yes.

[4082] A We also had three weeks, from the end of week one to the end of week four, three weeks of national network TV, spot radio and spot TV.

Q So in essence you spent between the beginning—the end of the first week and the beginning of the second week and the end of the fourth week, you spent forty-two percent of the budget?

A Fifty-two percent.

Q I'm sorry; fifty-two percent of the budget. So that in essence by the end of the fourth week, you had a cumulative expenditure of fifty-four point five percent. I'll make the point a little darker.

A Fifty-four point five percent.

Q Okay. By the end of the fourth week?

A And then the way our program was designed, you're on for three weeks and then you have a hiatus for two weeks.

Q Now by hiatus—

A No TV spot, radio—no TV advertising during that two week hiatus from the market.

Q All right. So let me circle the word "hiatus TV spots". In other words, you mean a hiatus in TV spots?

A Right. Well, TV and spot radio also.

Q Ah, hiatus—

A I didn't calculate it each individually.

[4083] Q Okay. A hiatus in TV and in spot radio?

A Yes.

Q All right. In other words, there was none going on?

A Right.

Q Okay. And so you spent a little—so there was a little hiatus there in TV and also a hiatus in spot radio from the end of the fourth week through the end of the fifth week?

A Two weeks.

Q For two weeks? So thus, by the end of the fifth week and the beginning of the sixth week, we had spent an accumulation of fifty-nine point percent of—

A By the end of the sixth week, we had spent, yeah, fifty-nine and a half percent. And the next three



week period, we came back in with TV at reduced levels. We also reduced our level on radio, as you can see, and we spent about twenty-five percent of our budget during that next three week period.

Q And that's the week of—

A Week number seven, eight, and nine.

Q The week ending seven, eight and nine. So that by the end of the ninth week, you had spent eighty-four point five percent cumulatively—

A Yes.

[4084] Q—of your domestic media expenditures for the '88 season?

A Then we had a two week hiatus again, with only national network radio.

Q And I'll circle the hiatus and TV. And, again, that was a hiatus in both TV and also a hiatus in radio spots?

A Yes.

Q Okay. I'll write "hiatus in TV and spot radio"; okay?

A And it came back in for three weeks, the weeks of eleven, twelfth—weeks of eleventh, twelfth, thirteenth, fourteenth, that three week period. We came back in with another TV flight, another three weeks of TV advertising, spot radio advertising, at a reduced level again; seventy-five—twenty-five to fifty rating points. And we spent about ten percent of our budget during that time.

And then at the end of the fourteenth week, we have just the remainder of our radio program, national

radio program, which we spent about three and a half percent of the budget through the end of the season.

But in the comparison of the two tables, I don't know how I'm going to do this, but in comparison of the two tables, as Tom noted, you look at the [4085] number at the end of six weeks, for example, in 1989 eighty percent of the budget had been spent on Exhibit 350. And comparatively, with the same table on Exhibit 353, at the end of the six weeks, we had spent fifty-nine and a half percent. We had a more—in '89 was a more front loaded program than 1988. If we had gone back to '85, '84, '83, you would see it would still have that dramatic front loading effect of the program, to get it off to a—to kind of give it a good kick-start, to begin with.

Q And that's like Mr. Dave Parker testified the tendency has been to front load more and more to get more bang for your costs?

A Yes.

Q And there's a little box in the right had corner of Exhibit 353?

A Yes.

Q And can you explain that, please?

A The upper right had corner of 353 are the numbers that I used for spot TV, two million one hundred and eighty thousand; network cable TV, two hundred and five thousand; network radio, eighty hundred and sixty-five thousand, and spot radio, two hundred and fifty thousand.

Q Thank you, Mr. Field. Again, you've told us something about pears with respect to '89, how they started basically after peach, plum and nectarine

money was already [4086] used up. Was the same true with respect to Exhibit 353 and regarding the 1988 season?

A Yes.

Q About when did the pears plug in, about that eleventh or twelfth week again?

A Right. They plug in around the twenty-second of July, depending on their season, earliness, lateness. And I don't—

Q Again, I take it, they don't do much TV?

A They don't do any TV. They provide a grant to the stone fruits, because on our summer—on the fruit bowl effect, there is a pear.

Q I see.

A You know, subliminally, some people will see the pear and so they do give a grant to the stones because the pear is in the ads.

Q So what you're saying that with respect to TV, they don't put up enough money to really worry about—just a little tiny grant, as I understand it?

A No TV.

Q And they spend a little bit in radio but by then peach, plum and nectarine has spent eighty-six, eighty-seven percent of the budget anyway; is that true?

A Yes, that's true. And also, see, their expenditures—the eighteenth week, I think, is around—[4087] the eighteenth week would probably be around the middle of September. And California is still selling pears out of storage the middle of September; they might have two thousand cars or anywhere—

maybe half of their crop still to sell, so they go into a spot TV buy in collaboration with the Northwest at that time, so it's not that they don't participate, it's that they have different demands on their schedule, their marketing development schedule, and so it does not truly affect these tables that I've presented.

Q So is it fair to say that with respect to all of the tables that we've just talked about, 348 through and including 353, we can just more or less forget about the pear influence?

A I think if you used the numbers and just compared the numbers, that they're relatively correct.

Q Okay. Because the pear numbers aren't significant enough in their timing and sold much later than peach, plum and nectarines, that it's really insignificant; is that what you're saying?

A Yes.

MR. CAMPAGNE: Your Honor, may we have a recess now for our afternoon recess to give me a chance —

JUDGE BAKER: Very well.

MR. CAMPAGNE: —to check the Federal Register for a couple of questions. But I wanted to know if

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UNITED STATES DEPARTMENT OF AGRICULTURE  
BEFORE THE SECRETARY OF AGRICULTURE

AMA Docket Nos.  
F & V 916-3  
F & V 917-4

IN THE MATTER OF WILEMAN BROTHERS & ELLIOTT,  
INC., A CALIFORNIA CORPORATION AND KASH, INC.,  
A CALIFORNIA CORPORATION, PETITIONERS

v.

CLAYTON YUETTER, SECRETARY OF AGRICULTURE,  
RESPONDENT

[Excerpts of Testimony of John Kashiki]

Fresno County Courthouse  
1100 Van Ness  
Fresno, California  
Wednesday, February 14, 1990

The above-entitled matter came on for hearing,  
pursuant to Recess, before the Secretary of Agriculture,  
at 9:05 a.m.

Before: DOROTHEA A. BAKER, Administrative Law  
Judge

[4141] Whereupon,

JOHN KASHIKI

the witness on the stand at the time of the recess,  
resumed the stand and was examined and testified as  
follows:

DIRECT EXAMINATION (RESUMED)

BY MR. CAMPAGNE:

Q Good morning, Mr. Kashiki.

A Good morning.

Q When we recessed for our evening recess last  
night at 6:00 p.m., you had been describing some  
efforts that you had made to make the Kash label  
known in Chili and the United States and in Japan and  
so I want to start this morning's testimony with a  
broad question to you and that is, why are you so  
devoted to giving recognition to the Kash label?

A I think because a very important thing is  
getting the buyer or my wholesaler recognition of the  
Kash label and also familiar with the housewife or the  
consumers, recognition of the Kash label. I think  
that's very important.

Q You sell to a lot of chain stores?

A We sell a lot to chain—primary most of it to the  
chain stores and we—

Q And you're trying to get recognition from [4142]  
the chain store buyers of the Kash label?

A Yes.

Q And also from their customers, the housewife?

A The housewife, right down to the consumers.

Q I see. Why is that so important to you to have  
Kash label recognition of the chain store buyers and  
of the housewives that shop at the chain stores?

A Well, this had been about ten years ago on one of  
my trips back east, one of my good friends from South

Carolina and he was selling his peaches with his recognition of Sunnyslope Farm at a higher price and here the California peaches and nectarines were side by side selling at a cheaper price and the movement, it was about maybe one hundred to one. Why the Sunnyslope label? Recognition is very important and—

Q Let me see if I understood you correctly, what you're saying is that ten or more years ago, you were visiting a farmer friend of yours in South Carolina who had the Sunnyslope label?

A That's right.

Q And you and him were in a store together and noticed that your peaches weren't moving and his were moving about one hundred to one?

[4143]

A That's right.

Q And you determined that that was because no one knew your label but everybody knew his label?

A That's right.

Q Is Sunnyslope a pretty famous label in South Carolina?

A I think it's—on the far—on the eastern coast I think it's very famous over there. In fact, his demand exceeded his supply and so I told him maybe I could supplement that, you know.

Q You wanted to copy his idea—

A Or even supplement for the price that he was getting and—

Q And that's when you and him were in that store together, was he even getting more money for his peaches than you were for yours?

A Well, they wouldn't even look at mine. I mean, they were buying Sunnyslope Farm peaches. And I

think our quality peaches, plums and nectarines were just as good.

Q As his?

A As his.

Q But they were—

A As anybody, I think in California we have pretty good fruit. I think—

[4144]

Q But they were buying his anyway?

A Buying his. And it wasn't the price factor because I can show the time that some of his were sixty-nine cents a pound and we were trying to sell at thirty-nine cents a pound and the consumer would turn around and keep buying the sixty-nine cents.

Q Because they knew his label?

A Evidently.

Q And then you—this was ten or more years ago when you then learned that lesson and decided to copy Sunnyslope and start building your own label?

A Let's don't say ten years, because it makes me pretty old, it seems like just a few years back. It's been a few years.

Q We don't want to age you.

A They're trying to put me out in the pasture already, and I don't want to expedite them, but it's been a few years and Mr. —from Sunnyslope—Louis Gonseones (phonetic), a very close friend of mine. He's been over to my place and I've been over to his place and he says, "why don't you do something"? And he says I can show you different areas, I want you to go up to Cincinnati and Minneapolis and whatnot. And I went to those areas.

Q You took this gentleman's advice that owns [4145] Sunnyslope label?



A Right, I made some trips back there and I did some surveying so I was probably there for about two weeks. Just general survey exactly how the movement was going, what type of promotion, what type of ideas. And these things really come to my mind and so at that point I wanted Kash recognition. Brand recognition, I guess you would call it. Also to the—

Q This is after doing some surveys as to how important brand recognition is to the Kash company?

A Right. And in the Cincinnati area we have what we call a Sweetheart Plum. It's a new variety that comes in late. And it's through this we thought maybe we could get a little more recognition. And so what we did, we had—we didn't have too much varieties, but we had a lady cut the little pieces up and you've probably gone to the store where they give you a little taste and see what it tastes like. If it's good you'd go back and if it's bad you'd just keep on walking.

Q A sampler lady in the store?

A I guess you would call a sampler lady. And we did this in Cincinnati and it was amazing what were the results. Some little child walking by with their mother and gave her a piece of this. And the child ate this. First thing I knew, grabbing the mother [4146] back and he says, I want a bag of this. And we were selling that, if I'm not mistaken, almost about a dollar a pound. But we didn't have too much but we just wanted to see if it would move at a dollar a pound. It was no problem, the price. So the price is not the thing. I think it's the recognition, what that—of the variety of that fruit, plus I think if it's Kash they're going to come back and keep buying Kash regardless of what it is.

So I think a Kash brand recognition is very important. Not only from the buyer's standpoint but also from a consumer.

Q Now you told me one time that you even received letters on you Kash recognition advertising program from some of the consumers asking where they can find more Kash labels and things like that.

A Well, this is not only for stone fruit, but we also try to put this on an individual product itself and when this was on display and I think you have some of those little stickers—

Q Rodney showed us some of those little stickers—

A And from different varieties, we have different labels for designating how to cook the merchandise or how to store it or something like that. [4147] And we've gotten letters back and they say, where can we still buy the certain product? So I say, go to your store manager and request Kash brand and we would be very happy to accommodate them.

Q Is it fair to say, Mr. Kashiki, that you strongly believed that the chain store buyers recognition of the Kash label and their consumers recognition of the Kash label, in your opinion, is one of the reasons for your company's good success?

A Yes, that's right.

Q Now, is it also fair to say that if you didn't have to give the advertising assessments to CTFA you would instead spend that money promoting your own Kash label?

A I think I would have spend a lot more money than what I have cause I think I'm limited to what I could do at this present time and I think it's part of the budget. It's like any other business, you can do so much and that's it.

Q So, what you're saying is that by CTFA, taking about eighty thousand dollars a year from you, I guess is approximately what was stipulated when Rodney was testifying, that that has limited the amount of money you could spend promoting your own label because of budgetary factors?

[4148]

A That's right. At least if they give me eighty thousand dollars more I could spend and I can spend and evaluate it whether we're getting results from that. And I think it would help to get Kash recognition to the—down to the consumer level.

Q Now I wanted to show you a picture—I wonder if I can mark this photograph next in order. For the record, Mr. Kashiki, I've marked a photograph that appears to be a photograph of a fruit display in a store with the Kash labels, with the fruit kind of cascading down at an angle towards it. It's a photograph of maybe about five inches by seven inches, something like that. Is that the type of in-store—is that a sample of the type of in-store promotion that you've started doing for some years now, ever since Sunnyslope gave you the idea of pushing your Kash label?

(The document referred to was marked as Exhibit P 357 for identification.)

(Witness proffered document)

A This is one of the projects that we started. I think—in other words when they come up to buy something, they buy the fruit and right below it Kash stands out. We have it right out in the open. And if—something has to be with you, you can hear a lot

\* \* \* \* \*

[4193] In other words, if I want to turn around and put them through a hydro cool forced air, that's my judgment. Don't tell me what I can do and what I can't do. I'm not telling you or anybody else to go to hydro cool or—by going to hydro cool in the same definition we got a lot of favorable results.

And on our box that we put the Kash on the side, we put hydro cool and a lot of the buyers would want this hydro cool fruit because Kash is the one that has it. Now everybody, there's quite a few people that have hydro cool so it doesn't give me advantage, so now we're going to have to change our method of doing other things here in advertising merchandising and this is why I like to go out into the areas where they handle the fruit, not only the packing end of it, but the handling of the fruit.

Q You mean—without—you like to visit retail stores—

A Retail stores, and see how the housewife, the consumer that buys the product. Why did you buy this? And it's been changed over a period of years. And—

Q In the surveys you've been conducting?

A In the surveys I've been conducting. I know when I went to the Orient, it's a different type of [4194] market and different type of product that they want. You might like one type I might like different. I know you talked to yesterday—he got up there and said he liked nectarines—which he thinks are the best. I don't think they're the best, that's his opinion, but I think on my end, I like the John Rivers, or Stand Rivers nectarine, I think that's a better nectarine, so to each his own.

I think we have a different taste, we have a different opinion and—but don't tell me what I can do and what



I can't do. I think this is a free enterprise and we'd like to be—do what we want to do. I think that's what makes it challenging and it makes it real interesting. And not to follow somebody else but do things that you want to do to make a better product.

To make the consumer happy, that they want to come back to, that's my reward. I want the consumer to be able to come back, I want the Kash label, I want that product, it's not dollar and cents wise, that's Rodney's department. As far as I'm concerned, I want the people who are happy on the other end to be able to come back and say I want Kash merchandise, Kash merchandise. I think that's my reward and how do you determine that in dollars and cents.

Q And you don't want your money being spent [4195] promoting someone else's—

Some else—well, if they want to do that fine, that's up—certainly I'm not going to tell them what they want to do. If they want to contribute voluntarily to a certain organization to do TV or radio advertising, that's fine, but let me do the way what I want to do, the way I think it's good.

MR. CAMPAGNE: Thank you, Mr. Kashiki, excuse me one moment.

Your Honor, may we go off the record for a minute?

JUDGE BAKER: Off the record.

(Whereupon, a short recess was taken.)

JUDGE BAKER: We are now back on the record.

MR. CAMPAGNE: Yes, your Honor, I have no further questions for Mr. Kashiki at this time.

JUDGE BAKER: Very well—

MR. CAMPAGNE: Other than, I would like to move into evidence the picture of the squash, which is 356, the picture of Mr. Kashiki and his wife in front of their Japanese office, in Japan, which is Exhibit 355.

I'd like to move the picture of the fruit in the store kind of cascading down the Kash label boxes which is 357 and then I would like to move in the photocopies of the

\* \* \* \* \*

Section 501(a)-(d) of the Federal Agriculture Improvement and Reform Act of 1996, Pub. L. No. 104-127, 110 Stat. 1029, provides as follows:

**SEC. 501. COMMODITY PROMOTION AND EVALUATION.**

(a) **COMMODITY PROMOTION LAW DEFINED.**—In this section, the term “commodity promotion law” means a Federal law that provides for the establishment and operation of a promotion program regarding an agricultural commodity that includes a combination of promotion, research, industry information, or consumer information activities, is funded by mandatory assessments on producers or processors, and is designed to maintain or expand markets and uses for the commodity (as determined by the Secretary). The term includes—

(1) the marketing promotion provisions under section 8c(6)(I) of the Agricultural Adjustment Act (7 U.S.C. 608c(6)(I)), reenacted with amendments by the Agricultural Marketing Agreement Act of 1937;

(2) Public Law 89-502 (7 U.S.C. 2101 et seq.);

(3) title III of Public Law 91-670 (7 U.S.C. 2611 et seq.);

(4) Public Law 93-428 (7 U.S.C. 2701 et seq.);

(5) Public Law 94-294 (7 U.S.C. 2901 et seq.);

(6) subtitle B of title I of Public Law 98-180 (7 U.S.C. 4501 et seq.);

(7) Public Law 98-590 (7 U.S.C. 4601 et seq.);

(8) subtitle B of title XVI of Public Law 99-198 (7 U.S.C. 4801 et seq.);

(9) subtitle C of title XVI of Public Law 99-198 (7 U.S.C. 4901 et seq.);

(10) subtitle B of title XIX of Public Law 101-624 (7 U.S.C. 6101 et seq.);

(11) subtitle E of title XIX of Public Law 101-624 (7 U.S.C. 6301 et seq.);

(12) subtitle H of title XIX of Public Law 101-624 (7 U.S.C. 6401 et seq.);

(13) Public Law 103-190 (7 U.S.C. 6801 et seq.);

(14) Public Law 103-407 (7 U.S.C. 7101 et seq.);

(15) subtitle B;

(16) subtitle C;

(17) subtitle D; or

(18) subtitle E.

(b) **FINDINGS.**—Congress finds the following:

(1) It is in the national public interest and vital to the welfare of the agricultural economy of the United States to maintain and expand existing markets and develop new markets and uses for agricultural commodities through industry-funded, Government-supervised, generic commodity promotion programs established under commodity promotion laws.

(2) These generic commodity promotion programs, funded by the agricultural producers or processors who most directly reap the bene-



fits of the programs and supervised by the Secretary of Agriculture, provide a unique opportunity for producers and processors to inform consumers about their products.

(3) The central congressional purpose underlying each commodity promotion law has always been to maintain and expand markets for the agricultural commodity covered by the law, rather than to maintain or expand the share of those markets held by any individual producer or processor.

(4) The commodity promotion laws were neither designed nor intended to prohibit or restrict, and the promotion programs established and funded pursuant to these laws do not prohibit or restrict, individual advertising or promotion of the covered commodities by any producer, processor, or group of producers or processors.

(5) It has never been the intent of Congress for the generic commodity promotion programs established and funded by the commodity promotion laws to replace the individual advertising and promotion efforts of producers or processors.

(6) An individual producer's or processor's own advertising initiatives are typically designed to increase the share of the market held by that producer or processor rather than to increase or expand the overall size of the market.

(7) In contrast, a generic commodity promotion program is intended and designed to

maintain or increase the overall demand for the agricultural commodity covered by the program and increase the size of the market for that commodity, often by utilizing promotion methods and techniques that individual producers and processors typically are unable, or have no incentive, to employ.

(8) The commodity promotion laws establish promotion programs that operate as "self-help" mechanisms for producers and processors to fund generic promotions for covered commodities which, under the required supervision and oversight of the Secretary of Agriculture—

(A) further specific national governmental goals, as established by Congress; and

(B) produce nonideological and commercial communication the purpose of which is to further the governmental policy and objective of maintaining and expanding the markets for the covered commodities.

(9) While some commodity promotion laws grant a producer or processor the option of crediting individual advertising conducted by the producer or processor for all or a portion of the producer's or processor's marketing promotion assessments, all promotion programs established under the commodity promotion laws, both those programs that permit credit for individual advertising and those programs that do not contain such provisions, are very

narrowly tailored to fulfill the congressional purposes of the commodity promotion laws without impairing or infringing the legal or constitutional rights of any individual producer or processor.

(10) These generic commodity promotion programs are of particular benefit to small producers who often lack the resources or market power to advertise on their own and who are otherwise often unable to benefit from the economies of scale available in promotion and advertising.

(11) Periodic independent evaluation of the effectiveness of these generic commodity promotion programs will assist Congress and the Secretary of Agriculture in ensuring that the objectives of the programs are met.

(c) INDEPENDENT EVALUATION OF PROMOTION PROGRAM EFFECTIVENESS.

—Except as otherwise provided by law, each commodity board established under the supervision and oversight of the Secretary of Agriculture pursuant to a commodity promotion law shall, not less often than every 5 years, authorize and fund, from funds otherwise available to the board, an independent evaluation of the effectiveness of the generic commodity promotion programs and other programs conducted by the board pursuant to a commodity promotion law. The board shall submit to the Secretary, and make available to the public, the results of each periodic independent evaluation conducted under this subsection.

(d) ADMINISTRATIVE COSTS.—The Secretary shall annually provide to the Committee on Agriculture of the House of Representatives and the Committee on Agriculture, Nutrition, and Forestry of the Senate information on administrative expenses on programs established under commodity promotion laws.



**Supreme Court of the United States**

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No. 95-1184

DAN GLICKMAN, SECRETARY OF AGRICULTURE,  
PETITIONER

*v.*

WILEMAN BROTHERS & ELLIOTT, INC., ET AL.

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[Filed: June 3, 1996]

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**ORDER ALLOWING CERTIORARI**

The petition herein for a writ of certiorari to the  
United States Court of Appeals for the Ninth Circuit  
is granted.